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CARTELS AND TRUSTS

CARTELS AND TRUSTS

THEIR ORIGIN
AND HISTORICAL DEVELOPMENT
FROM THE ECONOMIC AND
LEGAL ASPECTS

by

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AUTHOR'S NOTE

I SHOULD like to express my best thanks to my English translator, Mr. William J. Peace, for his help.

INTRODUCTORY

accepted with regard to similar organizations of producers and merchants which assumed diverse names in different countries, such as syndicates, associations, coalitions, concerns, combinations, pools, trusts, and so forth.

This view, however, has from the very beginning constituted a misconception which was fatal in its effects. Even Kleinwächter himself was not of the opinion which could be inferred from his introduction, so unhappily put, but held a diametrically opposite view, describing cartels as agreements of *producers-entrepreneurs* in the same branch of trade aiming at a partial elimination of unlimited mutual competition and such

¹ KLEINWÄCHTER (Professor in Economics at Czernovitz University, formerly Austria, now Roumania), *Die Kartelle*, Innsbruck, 1883, p. iii. "*Die bisherige volkswirtschaftliche Literatur enthält meines Wissens nichts über Kartelle. Es bleibt mir daher, wenn ich mich über diese interessante Erscheinung des heutigen Wirtschaftslebens belehren wollte, kein anderer Ausweg, als mich direkt mit Fragen an die beteiligten Kreise zu wenden.*"

² The word "cartel" in our present meaning was probably for the first time used by the deputy RICHTER in the German Reichstag in May 1879, during the debate on certain cartels in the railway, rail, carriage, and locomotive industries; they were selling abroad at a lower price than at home (dumping).

¹ KLEINWÄCHTER, *ut sup.*, p. 126: “. . . *Übereinkommen der Produzenten*, und zwar *der Unternehmer der nämlichen Branche*, deren Zweck dahin geht, die schrankenlose Konkurrenz der Unternehmer untereinander einigermassen zu beseitigen und die Produktion mehr oder weniger derart zu regeln, dass dieselbe wenigstens annähernd dem Bedarfe angepasst werde.”

The incorrect delimitation of cartels to producers only Kleinwächter has later destroyed when speaking in a general way of *unions of entrepreneurs in the same line of business*, thus including *merchants*, in *Handwörterbuch der Staatswissenschaften*, Jena, 1900 (2nd ed.), Vol. V, p. 39: “*Verbände von Unternehmern derselben Branche*, deren Zweck dahin geht durch ein gewisses solidarisches Vorgehen der Genossen *die gegenseitige Konkurrenz einzudämmen oder gänzlich auszuschliessen*, um auf diese Weise die wirtschaftliche Lage der betreffenden Unternehmer, bezw. der betreffenden Geschäftsbranche günstiger zu gestalten.”

² KLEINWÄCHTER, *ut sup.*, p. 138. “*Über das Alter und die Entstehung der heutigen Kartelle in Deutschland und Österreich vermochte ich so gut wie nichts in Erfahrung zu bringen*. Meine diesfälligen Anfragen wurden entweder gar nicht oder ganz unbestimmt (*hierüber ist mir nichts bekannt*, u. dgl.) beantwortet.” The tin-plate cartel of Cologne (“Weissblech-Comptoir in Köln”), 1862, was mentioned by all these people as one of the oldest existing cartels. Most of the new cartels were said to have been formed after the crash of 1873. Kleinwächter emphasizes that not all were necessarily the result of the crisis and the “*offsprings of misery*” (*Kinder der Not*). There were some that originated during the years of prosperity, 1870-73; for instance, some cartels in the German iron industry (*ut sup.*, pp. 142 et seq.).

³ KLEINWÄCHTER, *ut sup.*, pp. 137 et seq.: “*Was das Alter der Kartelle anbelangt, so scheint dasselbe hoch hinauf zu reichen*, wenigstens berichtet C. NEUBURG (*Zunftgerichtsbarkeit und Zunftverfassung in der Zeit vom 13. bis 16. Jahrhundert*, Jena, 1880, p. 152), dass die Brauer von Amiens um das Jahr 1444 eine *Koalition geschlossen und sich untereinander verpflichtet hätten, die Tonne Bier, die bis dahin 19-20 sols gekostet hatte, nunmehr nicht unter 24 sols zu verkaufen.*”

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The existence of numerous anti-cartel laws did not, unfortunately, suggest to Kleinwächter that in connection with their issue and their later amendments—in particular the rider of 1864 to the Code pénal mentioned by him³—they were certainly discussed somewhere in literature. This idea would have induced him to discover that the question of cartel associations of producers and merchants was discussed in lively fashion in France in the first half of the nineteenth century, especially by the great Proudhon, whose pertinent remarks on the French coal cartels of that period retain their full value to-day.⁴ Further, an interesting discussion on the same topic in connection with the amendments to the respective provisions in the Code pénal was going on in the French Diet and literature in the days of Kleinwächter.⁵ And in Germany there was Lexis,⁶ who before Kleinwächter wrote on cartel

¹ Kleinwächter exemplifies it (pp. 138 and 164 sqq.) by the Austrian Criminal Codes of 1803 (Pt. II, §§ 227–8); 1852 (§§ 479–80); the Law of April 7, 1870, and Art. 414 and foll. of the Code pénal of 1810.

² KLEINWÄCHTER, *ut sup.*, p. 138. ³ KLEINWÄCHTER, *ut sup.*, p. 165.

⁴ PROUDHON, *Système des contradictions économiques*, Paris, 1846, Vol. I, pp. 185 sqq. and 215 sqq. In the following year this excellent book was translated into German—Proudhon, *Philosophie der Staatswissenschaften*, deutsch bearb. von KARL GRÜN, Berlin, 1847. Cf. also pp. 342 sqq., post. On French coal cartels also CLÉMENT wrote, "Nouvelles Observations sur le monopole des houilles de la Loire," in *Journal des Economistes*, Paris, 1847, Vol. XVI, pp. 15 sqq.

⁵ In particular the comprehensive article of the Dean of the Faculty of Laws of the Paris University, Professor BATBIE, "La loi sur les coalitions," in *Revue Critique de Législation et de Jurisprudence*, Paris, 1864, Vol. XXIV, pp. 399 et seq.

⁶ LEXIS, "Gewerkvereine und Unternehmerverbände in Frankreich," in *Schriften des Vereins für Sozialpolitik*, Leipzig, 1879, Vol. 17, pp. 27 et seq.

monopoly. Kleinwächter himself frequently stated this, and in his work constantly emphasized that only by a monopolization of the various industries could cartels fulfil their task and become, under the supervision of the State, a desirable regulator of anarchic production, adapting it to the needs of demand, and thus protecting it against over-production and crises. Without some, but not a complete, monopolization, this is, according to him, impossible, because the producers would never feel sure that there would not be someone to thwart their plans and glut the market with a given commodity without regard to the demand.²

¹ KLEINWÄCHTER, ut sup., pp. 197 et seq.

² KLEINWÄCHTER, ut sup., p. 83. "So viel scheint mir allerdings richtig dass eine planmässige und einheitliche Leitung der Volkswirtschaft *ohne eine gewisse Monopolisierung der wichtigsten Produktionszweige nicht wohl denkbar ist*, denn wenn die Produktion dem Bedarfe angepasst werden soll, müssen die betreffenden Produzenten, die für den Gesamtbedarf arbeiten, *auch die Sicherheit haben, dass ihre Pläne nicht von anderer Seite durchkreuzt werden*, dass nicht von anderer Seite der Markt mit demjenigen Artikel überflutet wird, dessen Produktion sie oben mit Rücksicht auf den '*Marktmagen*' (um den Marx'schen Ausdruck zu gebrauchen) in Schranken halten."

In like manner the essence and genesis of cartels was represented a few years later by the great German economic historian, BRENTANO. Probably even then the view was expressed that cartels were a modern phenomenon occasioned by the Austrian and German crisis of 1873, since Brentano laid special stress on the rectification of this erroneous opinion. Brentano, even more energetically than Kleinwächter, pointed to the medieval guilds, which like cartels regulated production and prices.² His opinion has a greater value as he was one of the most eminent investigators and authorities on English and Continental guilds and corporations. He further pointed out that over-production in manufacturing industry as well as economic crises commenced, not in 1873, but as early as the

¹ KLEINWÄCHTER, *ut sup.*, p. 178: ". . . eine Regelung der Produktion nach dem Bedarfe ohne ein gewisses Monopol der betreffenden Produzenten ist absolut undenkbar. Will man also die Ordnung der Volkswirtschaft, so muss man—wohl oder übel—sich entschliessen das Monopol mit in den Kauf zu nehmen."

² BRENTANO, in a lecture on cartels given at Vienna on the 29th of May, 1888, published in *Mitteilungen der Gesellschaft österr. Volkswirte*, I (1888-89), p. 83. "Niemand der sich je mit den mittelalterlichen Wirtschaftsorganisationen befasst hat, kann sich wohl der Erinnerung erwehren an die analogen Preisbestimmungen und Produktionsregeln der Zünfte."

A comprehensive review of this lecture was published in *Industrie*, Berlin, 1888, pp. 581 et seq., "Die Kartellorganisation vom Standpunkt der Wissenschaft"; and also in the book *Über die Ursachen der heutigen Not*, Leipzig, 1889, pp. 29 et seq.

middle of the eighteenth century. From 1753 onwards at short intervals, crisis after crisis arose in the years 1763, 1772, 1783, 1793, 1815, 1825, 1836-39, 1847, 1857, 1866, 1873. And while the theorists were racking their brains to remedy the evil, a solution was found in cartels.¹ These were parachutes, says Brentano picturesquely, used by production to reach terra firma after too lofty a flight. With repeated increase in demand, these cartels generally dissolved.² Contemporaneously with Brentano the nature and origin of cartels was likewise understood by SEEBOLD³ and STEIN.⁴

The first American publications on trusts proceeded along the same same lines and appeared at the same time. Among them the valuable treatise of Andrews⁵ is prominent. It draws on the official reports of the Committees appointed in the United States and Canada in 1888 to investigate the trust question.⁶ In more expressive terms than those of the first German authors, Andrews very pertinently states that: "Organizations *essentially the same* as some of the above (i.e. modern trusts) have existed for centuries, being, in fact, among the oldest institutions of which history speaks. Not to go back further, *the medieval guilds may be mentioned as such. In several English towns, the gilda mercatoria was exactly what would to-day be spoken of as trust.*"⁷ Nor were guilds the only

¹ BRENTANO, *Über die Ursachen* . . . , pp. 19 et seq.

² BRENTANO, *ut sup.*, p. 24.

³ SEEBOLD, "Produktions- und Preis-Vereinbarungen" (*Industrie*, 1888, pp. 628 et seq.).

⁴ STEIN, in *Industrie*, Berlin, 1889, pp. 17 et seq.

⁵ ANDREWS, "Trust According to Official Investigations," in *The Quarterly Journal of Economics*, Boston, 1889, Vol. III, pp. 117 et seq.

⁶ Report of the Committee on General Laws (Senate of the State of New York) on the Investigation relative to Trusts, 1888; Report of the Committee on Manufactures, House of Representatives, of the United States in relation to Trusts, 50th Congress, 1st Session, No. 3112; Report of the Select Committee, appointed 29th February, 1888, to investigate and report upon alleged combinations in manufactures, trade, and insurance in Canada, Ottawa, 1888.

⁷ ANDREWS, *ut sup.*, p. 120.

monopolist creations known to other centuries.”¹ And as an example he quotes one of the private monopolies of the sixteenth century. The colossal size of this movement is the only new feature.

From the very beginning the American writers united to stress the point that by *trusts* not only organizations of the type of the Standard Oil Company, etc., had to be understood—that is to say, trust organizations of the highest rank, *trusts sensu stricto*—but generally all possible forms of understandings and unions of entrepreneurs in the same branch, starting with an oral and informal agreement as to the price of a commodity.² All cartel forms known in Europe had also been applied in America.³ It has been pointed out that the same

¹ ANDREWS, *ut sup.*, p. 120. As an example he quotes the Pepper Monopoly of ROTT, 1560 (see p. 278, post), which he calls “a gigantic pepper trust.” Similarly DWIGHT, “The Legality of Trusts,” in *Political Science Quarterly*, New York, 1888, Vol. III, pp. 592 et seq., goes back to the old monopoly organizations and the Statute of Edward VI, 1552 (5 and 6 Edw. VI, Cap. 14). See later, pp. 190 sqq.

² COOK, *Trusts, The Recent Combinations in Trade*, New York, 1888, p. 4: “The term ‘Trust’ is popularly applied to *all methods* of effecting a combination in trade.” ANDREWS, *ut sup.*, pp. 119 et seq.: “The most divers species of joint undertakings are popularly stigmatized as ‘trusts,’ chief among which are the following: . . . IV. *Agreements as to prices or production lived up to with more or less fidelity. They may be very loose and general, or, more seldom, based on written covenants and sanctioned by penalties.*” On p. 120: “*Silent agreements as to prices have always prevailed among contiguous dealers in a given sort of goods.*” Similarly other writers.

³ LEVY VON HALLE, “Industrielle Unternehmer- und Unternehmungsverbände in den Vereinigten Staaten von Nordamerika,” in *Schriften des Vereins für Sozialpolitik*, Leipzig, 1894, pp. 93–322. This is the first complete treatise in German literature on American trusts based upon investigation on the spot. Before that time only a short informative article of ASCHROTT appeared, also based on personal experience in America: “Die amerikanischen Trusts als Weiterbildung der Unternehmer verbände,” in *Archiv f. Soziale Gesetzgebung u. Statistik*, Tübingen, 1889, Vol. II, pp. 383 et seq. For the trust forms see pp. 133 and foll. Coming from a German who knew his own cartels well, the judgment is all the more valuable. Cf. also ANDREWS, *ut sup.*, pp. 119 et seq.

causes brought about the formation of trusts and that they were guided by the same purposes at which aimed the cartels, syndicates, etc., of Europe. Their monopolistic character was stressed at the same time.¹

These preliminary investigations into the nature of trusts in American literature could have made it clear to anyone who was interested in the German cartel movement that cartels are not a German or European speciality, but a common phenomenon encountered in all countries with a developed industry and commerce. As a result of the various local and temporal conditions, differences occurred merely in the manifold forms assumed by one and the same monopoly movement, dating everywhere from the remotest times.

It appeared that later studies on cartels would proceed along the lines of an examination in the first place of the genesis and historical development of the monopoly movement, in which cartels and trusts form only the latest phase. It is impossible to understand any phenomenon of our existence, especially in the domain of economics or law, without becoming acquainted with its pedigree.

However, it happened otherwise. In 1890 a long article on cartels appeared in a well-known German economic periodical, in which the author, SCHOENLANK, without any scientific foundation for his views, severed cartels from their connection with the past and from the monopoly movement as a whole, and represented them to the world as a new-born child of Austro-German origin. In literary form even the day and place of birth were given: "On May 9, 1873, when in Vienna,

¹ ANDREWS, *ut sup.*, pp. 120 et seq.; COOK, *ut sup.*, p. 4; LEVY VON HALLE, *ut sup.*, pp. 154 et seq., 139 sqq., and 126; GUNTON, "The Economic and Social Aspect of Trusts," in *Political Science Quarterly*, New York, 1888, Vol. III, pp. 389 sqq., does not exclude the monopolistic character of trusts, but only remarks that even so competition exists between the trust and outsiders, or between several trusts. Nobody ever doubted that such a competition might exist. LLOYD, "Die Trusts in Nord-Amerika," in *Soziale Praxis*, Berlin, 1897, Vol. VI, p. 941 sq.

the death-knell of economic prosperity rang out, the chimes announced the birth of cartels."¹ According to him, all older cartels are only detached events, which must be passed over in silence, as the cartel movement became a *social institution* only after "the great crash" of 1873, when most of the cartels in Germany and Austria were formed.² On what Schoenlank based this confident assertion no one knows, as he gave it without evidence. On the contrary, from later researches of BÜCHER and PHILIPPOVICH³ it is clear that not only immediately after the collapse of 1873, but even in the following years, cartels were formed in a few instances only. It was not until the year 1880 that cartels began to grow with increasing rapidity in Germany.

The statement that the cartel organization based itself on "the modern joint stock company where capital first learned to come together for an effectual co-operation," will also remain a professional secret of Schoenlank as a writer,⁴ for it is known that in Germany, in the days of Schoenlank, there was hardly a cartel in the form of a joint stock company.

Despite these evident defects the mistaken view of Schoenlank

¹ SCHOENLANK, "Die Kartelle," in *Archiv f. soziale Gesetzgebung und Statistik*, 1890, Vol. III, p. 493. "Am 9. Mai 1873, als in Wien die Sterbeglocke des 'wirtschaftlichen Aufschwunges' gellte, wurde die Geburtsstunde der Kartelle eingeläutet."

² SCHOENLANK, ut sup., pp. 492 sqq. "Von vereinzeltten Spuren in viel entlegeneren Perioden zu schweigen!"

"... es steht fest, dass die meisten der gegenwärtigen Kartelle in Deutschland und in Österreich ungefähr seit 1873, nach dem 'grossen Krach' entstanden sind. Damals fing das Kartellwesen an, eine soziale Institution zu sein."

³ BÜCHER, *Die wirtschaftlichen Kartelle*, Leipzig, 1895, p. 142. "In der Zeit unmittelbar nach dem grossen Krach wird es auffallend still auf diesem Gebiete. Wenigstens habe ich trotz aufmerksamen Suchens nicht mehr als zwei oder drei Beispiele aus den Jahren 1874-77 finden können." Similarly PHILIPPOVICH, *Grundriss der politischen Oekonomie*, Tübingen, 1906 (6th ed.), Vol. II, Pt. II, p. 194.

⁴ SCHOENLANK, ut sup., p. 492. "Die Bausteine für die Kartelle lieferte die moderne Aktiengesellschaft. In ihr hat das Kapital zuerst gelernt, sich zu kooperativer Wirksamkeit zusammenzuschliessen."

rapidly found more followers than the opposite opinion of his predecessors, such as Kleinwächter, Brentano, Andrews, and others. The valuable work of BABLED—showing that the American trusts, French syndicates, and German cartels, though engendered by modern industrial crises, are no novelty, but only a new edition of the medieval guilds and corporations,¹ and pointing out that the same organizations had been widely applied in the French coal-mining industry as early as the first half of the nineteenth century—proved of no avail.² The expositions of other authors, in particular of CLAUDIO-JANNET and MENZEL, linking the beginnings of the cartel movement with the still earlier Roman times,³ were also in vain.

In vain did BRENTANO and BÜCHER repeatedly demonstrate that to connect the origin of cartels with the year 1873 is entirely incorrect, for the cartel movement in Germany as well as in France and England was much stronger in the first half of the nineteenth century and became more intense after 1880. Actually, during the years 1873–80 it was comparatively quiet.⁴ Bücher rightly emphasized that it is incorrectly stated again and again that cartels are the “*offspring of indigence*” (*Kinder der Not*); and illustrates by examples that in Germany

¹ BABLED, *Les syndicats de producteurs et détenteurs de marchandises*, Paris, 1892, pp. 3 et seq. and 151 et seq. “Les syndicats d’industriels ou de commerçants ne sont, avons-nous dit plus haut, qu’une réédition modernisée des Guilds et des corporations anciennes, accommodées à des besoins nouveaux.”

² BABLED, ut sup., pp. 16 et seq.

³ CLAUDIO-JANNET, *Des syndicats entre industriels pour régler la production en France*, Paris, 1894, pp. 1 sqq.; MENZEL, “Die wirtschaftlichen Kartelle und die Rechtsordnung,” in *Schriften des Vereins f. Sozialpolitik*, Leipzig, 1895, Vol. 61, pp. 23 sqq.

⁴ BRENTANO, “Die wirtschaftlichen Kartelle,” in *Schriften des Vereins f. Sozialpolitik*, Leipzig, 1895, Vol. 61, pp. 175 et seq. “Es ist gewiss unrichtig, die Kartelle erst mit dem 9. Mai 1873 beginnen zu lassen. Schon aus den vierziger Jahren sind mir grosse Kartelle von englischen Kohlenbergwerken bekannt,” etc.; BÜCHER, “Die wirtschaftlichen Kartelle,” in *Schriften des Vereins f. Sozialpolitik*, Leipzig, 1895, Vol. 61, pp. 138 and 141 sqq.

they were formed also in periods of economic prosperity, i.e. in the sixties, before the collapse of 1873,¹ with a view to making the most of favourable market conditions.

All this, however, did not convince the majority whose spokesman, STIEDA, at that time fully accepted the thesis of Schoenlank. He considered it even advisable to repeat like a dogma the phrase about the bells which chimed in Vienna on May 9, 1873, to announce the birth of cartels. The appearance of Kleinwächter's first book on cartels was for Stieda tantamount to the origin of cartels themselves. He relates this as a discovery.²

The conception of Schoenlank was expressed by SCHAFFLE still more picturesquely than by Stieda, who said that cartels came down like a bolt from the blue!³ The same standpoint has also been taken up throughout all his works⁴ by LIEFMANN,

¹ BÜCHER, *ut sup.*, p. 142. The same was pointed out before Bücher by KLEINWÄCHTER, *cf.* note 1, p. 3, *ante*.

² STIEDA, "Kartelle," in *Schriften d. Ver. f. Sozialpolitik*, Leipzig, 1895, p. 3. "*Von Kartellen hat die Wissenschaft der Nationalökonomie bis vor etwa 15 Jahren kaum etwas gewusst. Es machte den Eindruck einer Art Enthüllung, als Professor Kleinwächter im Jahr 1883 zum ersten Male auf Grund mühevoll gesammelter, vielen ganz unbekannt gebliebener Thatsachen das Wesen dieser Unternehmerverbände eingehend beleuchtete.*"

After eighteen years STIEDA came to the conclusion that Schoenlank's conception is utterly false; he stated this expressly in "Aeltere deutsche Kartelle," in *Schmoller's Jahrb.*, Leipzig, 1913, pp. 725 et seq., pointing out that the cartel movement originated in the fifteenth century. Stieda thought better not to mention his previous views.

³ SCHAFFLE, "Zum Kartellwesen und zur Kartellpolitik," *Ztschr. f. d. ges. Staatswissenschaft*, Tübingen, 1898, p. 467. "*Fast wie ein Blitz aus dem kaum noch so heiteren Himmel des Glaubens, welcher dem 'freien Spiel der Kräfte,' dem Konkurrenzharmonismus der liberalen Volkswirtschaft galt, sind die Kartelle herniedergefahren.*"

⁴ LIEFMANN, *Die Unternehmerverbände (Konventionen, Kartelle)*. Ihr Wesen und ihre Bedeutung, Freiburg, 1897, pp. 135 et seq. And also in the later *Kartelle, Konzerne und Trusts*, which is his chief work on cartels and trusts, throughout all its eight editions; latest edition: 8th ed., Stuttgart, 1930, pp. 19 et seq. Likewise in the *Handwörterbuch der Staatswissenschaften*, Jena, 1923, 4th ed., Vol. V, pp. 612 et seq.

who is a leading writer in German cartel literature. He admitted in his first book that cartels were known in Europe (in the coal trade of England) as early as the eighties of the eighteenth century, and later under the influence of Professor Strieder's valuable work he dated it back to the beginnings of the fourteenth century, but these "isolated" cartels are, in his opinion, not connected with the modern movement.¹ The latter set in during the seventies of the nineteenth century, as a new reaction against the accepted principle of free competition. The public learned for the first time of the existence of cartels from the speech made by Deputy Richter on the 5th of May, 1879, in the Reichstag. Liefmann says: "*The conception and substance of cartels were then still quite unknown!*"² From these small beginnings, he continues, in the short space of one generation cartels developed into one of the most important phenomena of modern national economy. And rightly he expresses surprise at his own observations: "Such a rapid expansion is unheard of in economic development, which usually reckons over much longer periods of time." The conclusion is: "The causes of cartels must be deeply rooted in the *present-day economy*, their formation *at that particular moment* must have been a necessity." And as the profoundest cause Liefmann instances the modern technically improved mass production and mass sale.³ The appearance of the name "*cartel*" Liefmann identifies with the origin of the phenomenon as such, which was given merely a new name.

¹ STRIEDER, *Studien zur Geschichte kapitalistischer Organisationsformen, Kartelle, Monopole und Aktiengesellschaften im Mittelalter und zu Beginn der Neuzeit*, München, 1914 (2nd enlarged ed., Munich, 1925), so far the best work on the history of the cartel movement, not only among those which have been published in Germany.

² LIEFMANN, *Kartelle, Konzerne und Trusts*, Stuttgart, 1930, 8th ed., pp. 22 sqq. On page 23: "*So kam es, dass, als Ende der 70er Jahre zum ersten Male einige Kartelle die Öffentlichkeit beschäftigten, der Begriff und die Sache selbst noch durchaus unbekannt waren.*"

³ LIEFMANN, *ut sup.*, pp. 23 sqq.

Liefmann was followed by a host of writers, German and others, all of whom ignored earlier cartels owing to their "lack of connection" with the modern ones. There grew apace newer and newer theories on the wheres, whens, whys, and wherefores of this "interruption." These theories as a rule cancelled one another out, the usual fate of theories divorced from actuality. I am dealing with them fully in the respective chapters.

Along the lines of Schoenlank travelled also Professor FLECHTHEIM: he is the author of the best legal treatise on cartels in German literature. He calls the cartel law "*the new land of law*," a region which the lawyer hitherto dared to enter only with timidity and with the assistance of the economist (in 1922!). This is, according to him, quite understandable, because the evolution of law usually limps far behind economic and technical progress. "*The same*," he says, "*we observe to-day in the laws relating to air navigation as well as in the cartel laws. The air law and cartel law are still in their infancy.*"¹

On the other hand, serious voices were also raised pointing out the absurdity of such a construction of the cartel and trust phenomenon, since analogous unions of producers and merchants have been known in economic history ever since the earliest times. It was often indicated that the Roman law contained provisions combating such associations, as in modern anti-trust and anti-cartel enactments. But these voices have always been and still are in a considerable minority. Further,

¹ FLECHTHEIM, *Die rechtliche Organisation der Kartelle*, Mannheim, 1912 (2nd enlarged ed., Mannheim, 1922). In the second edition we read on page 1: "*Das Kartellrecht ist ein juristisches Neuland, ein Gebiet das der Jurist bisher nur mit zager Scheu und in ständiger Abhängigkeit von dem Nationalökonom zu betreten gewagt hat. Diese Erscheinung ist begreiflich. Die Rechtsentwicklung hinkt dem wirtschaftlichen und technischen Fortschritt meist beträglich nach. Das beobachten wir heute im Luftschiffsverkehrsrecht wie im Kartellrecht. Luftrecht und Kartellrecht stehen beide noch im Anfang der Entwicklung.*"

with the exception of the remarkable work of Strieder¹ they confined themselves to a few sentences and, what is still more important, did not show the connection existing between the old cartels and laws and modern conditions, the absence of which connection is put forward in prevailing opinion as a crucial argument. The latter therefore either passes them over in silence, or reiterates the argument of the various "breaks," and the lack of connection between the old cartels and those of to-day, representing cartels as a quite novel phenomenon.² All this with such unbounded assurance and scornful glances at their opponents (Grunzel against Menzel)³ that it sometimes happened that the latter, browbeaten and ashamed to endorse their own words, instead of vindicating their well-founded view gave in and went over to the triumphant thesis of Schoenlank. Thus was Menzel defeated in his unfortunate duel with Grunzel.

The excellent work of Strieder, based on original researches among hitherto unknown documents, and proving conclusively that cartels similar to those considered to-day as the latest novelty were known in the various countries of Europe as early as the fourteenth and following centuries, wrought no great change in the science of cartels. Some, however, who formerly rejected categorically the possibility of the existence of cartels in those times, inserted in the "*revised and enlarged*" editions of their early books, without change of the former text, a short note, inconspicuously mentioning the discovery of Strieder. But it was hastily added to save the shattered theory of the modernity of the cartel phenomenon that these cartels are not linked with the modern ones. Others continued repeating it as an unshaken tenet and did not mention Strieder's work at all. There is still another group best represented

¹ Cf. note 2, on page 16, ante.

² Statements in cartel and trust literature which demonstrate that the cartel phenomenon dates far back, I am fully considering in the course of this work.

³ See p. 118 et seq., post.

perhaps by WOLFERS, one of the most recent writers of German cartel literature,¹ which deals with Strieder's work in the bibliographical note only. In the text itself Wolfers does not even once refer to Strieder, although the latter occupies an opposite standpoint as regards the origin of cartels. For this reason he should all the more have felt it his duty to express an opinion on this remarkable work, which contests his own theory and that of Schoenlank. Why quote a book which one has not utilized?²

Furthermore, Wolfers does not mention at all that in the German-speaking world, apart from Strieder, other writers of standing—recently ISAY—explain the beginnings of cartels quite differently.³ This would have been all the easier for him as he had dealt with some of them in his bibliographical note. He does not, however, look beyond Schoenlank, and literally repeats the latter's sentence about the bells of Vienna, which on the 9th of May, 1873, announced to the world the birth of the first cartel, and calls this phrase "*famous*."⁴ He is so enchanted by it that he unhesitatingly counts among its adherents even BRENTANO and BÜCHER, *who were the first to demonstrate the groundlessness and fallacy of this unscientific phrase*.⁵

It was not enough, however, for Wolfers to glorify the theory of Schoenlank and turn his antagonists into adherents. He

¹ WOLFERS (Dr. jur. et Dr. Phil., Privatdozent an der Universität Berlin), *Das Kartellproblem im Lichte der deutschen Kartellliteratur*, München/Leipzig, 1931. (Edited as Vol. 180, Pt. 11, *Schriften des Vereins für Sozialpolitik*.)

² The way in which he quotes also deserves mention. The name of the author is distorted; instead of STRIEDER we find STRIEDA. The main title of the book is omitted (cf. note 1 on p. 22), the sub-title only being given, but also mutilated. One necessarily gains the impression that Wolfers never saw Strieder's book.

³ ISAY, "Die Entwicklung der deutschen und ausländischen Kartellgesetzgebungen," in *Zeitschrift f. ausländisches u. intern. Privatrecht*, Berlin, 1930, No. 1.

⁴ WOLFERS, *ut sup.*, p. 22.

⁵ WOLFERS, *ut sup.*, pp. 21 et seq.

goes farther than the school of his master and represents cartels not only as a complete novelty, closely connected with the Viennese crash of 1873, after which the first phase of the cartel movement commenced, but as a *German specific* discovered by the German science of economics. Says he: "*Until the Great War cartels were a specifically German and Austrian affair; the Anglo-Saxon and French science of economics treat cartels so to speak from afar, as a foreign, German phenomenon. The task of forming and building up a theoretical system of cartels devolves, therefore, on German science.*"¹

It is clear that though Wolfers is not acquainted with the foreign cartel literature, he nevertheless considered it possible to pass so fundamental a judgment upon it. He does not see that the same cartels were known in France, England, Italy, and other countries, though, of course, by different names, under which they are discussed in the literature of those countries; in some cases they existed even earlier than in Germany. Owing to the universality of the cartel movement, the cartel literature of the several countries remains under strong reciprocal influence. There is not one serious German book on cartels that does not consider at least a few foreign authors and identical organizations elsewhere. Similarly there is not one scientific book—English, American, French, Italian, or other—whether on trusts or syndicates, etc., which does not mention German cartels and the German cartel bibliography. Wolfers, however, did not notice that. He thinks that to-day one can write a scientific book on cartels and *completely* disregard the whole foreign literature. This is undoubtedly a sad effect of the delusion that cartels are a German speciality;

¹ WOLFERS, ut sup., pp. 1 and 22. On page 1: "Sie (scil. Kartellbewegung) bleibt bis zum Weltkrieg eine spezifisch deutsche und österreichische Angelegenheit; die angelsächsische und frauzösische Wirtschaftswissenschaft behandelt die Kartelle nur gleichsam aus der Ferne, als ein fremdländisches, ein deutsches Phänomen. Der deutschen Wissenschaft fiel deshalb die Aufgabe zu eine Kartellehre zu entwickeln und auszubauen."

even if this were the case the omission of references to foreign literature could not be excused.¹

And what a work he has written on these lines! His book was intended, as its title indicates, and as the author states in the preface, to give a scientific, critical scrutiny of the whole German cartel bibliography. In the preface it is said that this work "*has critically to sift the literature which, though exceedingly rich, neglects certain problems . . . the gaps in the present cartel literature left open for later treatment have to be discovered and pointed out.*"² Wolfers believes that one can compile a work of this character without considering the comparative material in foreign literature, of which the German authors always make use, just as German writers had always availed themselves of a German contribution.

Surprise might perhaps be expressed that I have devoted so much space and time to this book, but there are important reasons which induced me to do so. First of all, unfortunately, one cannot regard this book merely as a writing of an individual. Wolfers is backed by a serious editorial committee especially set up for this purpose by so prominent and for science so

¹ As an excuse for restricting his work to the consideration of the most important German economic literature and a few principal books on the juristic aspect of the problem, Wolfers pleads that the bibliography to hand is *immense and could not otherwise have been mastered* (WOLFERS, ut sup., *Vorwort*). The manner of "considering" those few principal legal works may be best judged from the fact that the *most important* juristic work on cartels has been entirely ignored—*Die rechtliche Organisation der Kartelle*, Mannheim, 1922, 2nd enlarged ed., by FLECHTHEIM, Professor at the Berlin University, where Wolfers is lecturer. It is there regarded as a standard work. Wolfers, however, did not even find room for it in his bibliographical notes. Similarly, the first important book of MENZEL, *Die Kartelle und die Rechtsordnung*, Leipzig, 1902, has also been disregarded.

² WOLFERS, ut sup., *Vorwort*, ". . . zunächst einmal die sehr reichhaltige und dabei doch *manche Probleme vernachlässigende Literatur kritisch zu sichten.* . . ." "Es bedarf einer systematischen Darstellung des Kartellproblems selbst, sollen *die Lücken gefunden und aufgezeigt werden*, die die bisherige Kartellliteratur für künftige Bearbeitung offen gelassen hat."

meritorious an association as the German "*Verein für Sozialpolitik*." The aim expressed in the preface to Wolfers's book, a "critical sifting of the cartel literature, and pointing out its gaps and neglected problems," is also the aim of the editorial committee and the "*Verein für Sozialpolitik*." The reputation of this association and the patronage of the editorial committee, on which such names as LUDWIG MISES are conspicuous, and to some extent also the scientific standing of the author, may mean that in the eyes of some persons Wolfers's book is a signpost in the German science on cartels and a foundation for further studies. Foreign scholars, who are fully justified in relying in their comparative studies on the newest scientific publications of this kind, are specially exposed to such danger, the more so as the German cartel literature is very rich and is, as a rule, only partially accessible even in the largest libraries of London, Paris, and Rome.¹ In the most fundamental problem, as is the genesis of German cartels, Wolfers's book is not only incomplete, but, still worse, presents an entirely misleading picture.

It remains open, of course, to accept the theory of Schoenlank and consider cartels as a phenomenon peculiar to Germany, but it is not fair to pass over in silence the fact that there is in German literature another theory which counts many eminent scholars among its upholders. And he had still less right to convey the false impression that Schoenlank's theory was unanimously accepted in the German science and carelessly reckon some of its avowed opponents as its adherents.

This book further deserves attention because it is the latest systematic treatment of the cartel problem in the German literature and may, therefore, naturally be considered as the expression of the newest opinion in the German science on cartels, which in accordance with prevailing opinion puts

¹ I had occasion to discover this from personal experience in the course of my studies.

the older and opposing views of the minority into the shade as "obsolete."

And, finally, the chief reason for my special attention to the exposition of Wolfers: it is for me a striking instance of the many prejudicial consequences of disregarding the history of the movement. If modern economics would attach greater weight to history neither Wolfers nor anyone else could have risked the assertion that cartels are a German invention, and this belief is gaining ground to-day.

Schoenlank would not have struck on the fatal idea of his "Viennese bells" if he had studied history and read more carefully what Kleinwächter wrote before him. The bells of Schoenlank would have been silenced long ago if more attention had been paid to what Brentano and Bücher wrote on the beginnings of the cartel movement. The science of cartels and trusts would have presented a different view if it had progressed along the path which Strieder began to mark out so ably. There would not remain so many "disputable" and "unsettled" questions; various forms of the self-same economic phenomenon would not have been set down as things which differ *toto coelo*, and these barren considerations and polemics about the meaning of words having the same significance, as well as the many contradictions and absurdities which we meet to-day in the science of cartels and trusts, which are harmful not only to theory but also to the legal as well as practical solution of this important problem, could have been avoided.

With one of these disputed questions I have now to deal briefly, as it is closely connected with the subject matter of this work. This is the question of the *monopolistic* character of cartels and trusts. Its discussion becomes all the easier as the prevailing opinion shows not the slightest doubt that their monopolist tendencies are essentially inherent. However, the opposing minority view on this question also deserves attention, the more so as recently it has steadily won new adherents, and in the latest Italian literature it passes as an established fact.

The first to express this view of the minority was, so far as I could ascertain, Professor GRUNZEL, an adherent of Schoenlank, and until recently one of the leading authorities in European cartel literature, already known to us as the successful critic of Menzel's well-meant attempts to consider the historical aspect of the cartel movement. His success was largely responsible for the shelving of the historical side of the cartel and trust problem for many long years. In his first book on cartels Grunzel attacked also the prevailing theory about the monopolistic character of cartels, fortunately without serious harm so far to the science.¹

Grunzel starts his polemics with the inaccurate statement that the adherents of the "*monopolist*" theory, among them also Menzel, treat the monopolist position of cartels as a *means* to an end and not as an end in itself.² Yet even before Grunzel there were writers who declared that the attainment of the monopolistic position was not a means but the *aim* of cartels, and their opinion was shared by Menzel.³ In an inexplicable fashion he was guilty of the same oversight with regard to Philippovich.⁴

¹ GRUNZEL, *Über Kartelle*, Leipzig, 1902. On p. 23 he quotes Schoenlank's sentence about the "Viennese bells" and defends its accuracy.

² GRUNZEL, *ut sup.*, pp. 10 et seq.

³ MENZEL, "Die wirtschaftlichen Kartelle und die Rechtsordnung," in *Schriften des Vereins für Sozialpolitik*, Leipzig, 1895, pp. 24 et seq. "Zweck des Kartells ist demnach die *Einschränkung des Wettbewerbes* durch freie Vereinigung der Unternehmer. Es unterscheidet sich von einem *Monopole* im technischen Sinne darin, dass bei dem letzteren der freie Wettbewerb kraft rechtlicher Notwendigkeit ausgeschlossen erscheint."

The same word for word in the later *Die Kartelle und die Rechtsordnung*, Leipzig, 1902, pp. 3 et seq.

⁴ PHILIPPOVICH, *Grundriss der politischen Oekonomie*, Freiburg, 1893, I, pp. 148 et seq. Likewise in the later editions; in the 6th ed., Tübingen, 1906, I, pp. 201 et seq., II, pt. II, pp. 188 et seq. Grunzel quotes him on p. 10 (see p. 38, post). Before Grunzel also SCHMOLLER, *Allgemeine Volkswirtschaftslehre*, Leipzig, 1901, I, pp. 450 et seq., pointed out that a monopolistic control of the market is the aim of

Secondly, I see no reason why these two ways of approaching the same problem should be regarded as fundamentally different as they were by Grunzel and others. There is no essential difference between the definition of Bücher or Pohle giving as the aim of a cartel the attainment of the largest possible profits by restricting competition and monopolizing the market,¹ and the definition of Menzel, Landesberger, and others, who, without special reference to the question of profits, state that the limitation of competition and monopolization of the market forms their object.² The second formulation of the definition of a cartel does by no means exclude "the largest possible gain" as the *ultimate* goal of every cartel and trust; on the contrary, the authors of the latter definition think that this goes without saying and is so natural that there is no need to mention the striving after gain as a peculiarity of a cartel. On the other hand, those who include this in the definition of a cartel merely emphasize more strongly the point that cartels and trusts are primarily directed by considerations of the private benefit of their members, and not by the interests of the community, although the effects of cartels. And previously in *Verhandlungen d. Vereins f. Sozialpolitik über Kartelle*, Leipzig, 1895, pp. 234 et seq. Likewise the famous KOHLER, "Die Ideale im Recht," in *Archiv für bürgerliches Recht*, Berlin, 1891, Vol. V, pp. 161 et seq., which he expressed more strongly in his later work, *Der unlautere Wettbewerb*, Berlin, 1914. And also LOEW, "Der oesterreichische Kartellgesetz-Entwurf," in *Soziale Praxis*, Berlin, 1897, Vol. VI, p. 902.

¹ BÜCHER, "Die wirtschaftlichen Kartelle," in *Schriften des Vereins f. Sozialpolitik*, 1895, p. 145. "Jede vertragsmässige Vereinigung von selbständigen Unternehmungen, welche den Zweck verfolgt, durch dauernde monopolistische Beherrschung des Marktes den höchstmöglichen Kapitalprofit zu erzielen."

Similarly POHLE, *Die Kartelle der gewerblichen Unternehmer*, Leipzig, 1898, p. 11. And previously in *Verhandlungen des Vereins f. Sozialpolitik über die Kartelle*, Leipzig, 1895, pp. 202 et seq.

² MENZEL, ut sup., pp. 24 et seq. See note 2 on that page; LANDESBERGER, Gutachten in *Verhandlungen des 26. deutschen Juristentages*, Berlin, 1902, II, pp. 296 et seq. See also p. 82, post; PHILIPPOVICH, ut sup., I, pp. 148 et seq. Cf. p. 39, post.

their activity may coincide with the interests of the people and in many cases be useful to the State. Producer and merchant do not, of course, plan production or commerce merely to make it nice and pleasant to the eye but to secure some profit from it.

As regards the latter, both those who *expressis verbis* take into account the gain of the members in the definition of cartels as their ultimate purpose (Bücher, Pohle, etc.), and those who pass it by (Menzel, Landesberger, Liefmann, etc.), concur in that the restriction of competition in a greater or lesser degree, together with an adequate *monopolization* of the market, is the immediate purpose of cartels and trusts. As this aspect is essential and characterises *every* cartel and trust, we are fully justified in submitting that both explanations of the essence of cartels tally and that it would be merely superfluous to set one against the other.

The desire to secure a monopolist position was considered as the purpose of a cartel by all those authors who did not include it in their definitions, and gave as the purpose of a cartel "restriction of competition, regulation of production, and its adaptation to demand" only, e.g. Kleinwächter;¹ restriction of competition was not mentioned at all, and, as Liefmann wrote in his first work, one spoke only of the "regulation of the economic activity of their members . . . on a given, determined, and certain point".² A mono-

¹ KLEINWÄCHTER, *ut sup.*, p. 126; cf. p. 12, ante. Likewise ENGELKE, "Das deutsche Kalikartell . . .," in *Schriften d. Ver. f. Sozialpol.*, 1894, Vol. 60, pp. 3 et seq. The same opinion is also contained in the draft of the Austrian Cartel Act by Minister Bilinski, 1897. LANDESBERGER, "Der oesterreichische Kartellgesetz-Entwurf," in *Grünbunts Zeitschrift f. das Privat- u. Öffentl. Recht*, Vol. XXIV, pp. 35 et seq.; WITTELSHOFER, "Der oesterreichische Kartellgesetzentwurf," in *Archiv f. soziale Gesetzgebung u. Statistik*, Berlin, 1899, pp. 122, et seq.; STEINBACH, *Rechtsgeschäfte der wirtschaftlichen Organisation*, Vienna, 1897, pp. 146 et seq.

² LIEFMANN, *Die Unternehmerverbände*, Freiburg, 1897, p. 17. Similarly STIEDA, *ut sup.*, p. 13; BRENTANO, *Über die Ursachen der heutigen sozialen Not*, *ut sup.*, p. 23; FRIDRICHOWICZ, "Kartelle," in *Zeitschrift. f. d. gesamte Staatswissenschaft*, Tübingen, 1895, p. 635.

polization of the market was for them so natural and inevitable a consequence of restricted competition and regulated production that they did not find it necessary specially to include it in the definition of a cartel; but they took full account of it in their works.¹ Grunzel, however, does not see this and he therefore classifies as opponents of the monopolistic theory the writers who give restriction of competition as the purpose of cartels, although they had declared themselves unequivocally as its adherents.²

He gives the following reasons for his own standpoint: The overwhelming majority of cartels had never succeeded in uniting all enterprises producing a given article. They certainly tried to attain this ideal, *but it was not necessary to achieve their purpose, which is the point here*. It sufficed if the combined firms were able, either owing to the volume of production which they represented, or in any other way, so to influence the market as to bring about the intended regulation. But even if a cartel fortunately succeeds in embracing all the enterprises in a certain line there was still no monopoly because *there still exists the possibility of new competition springing up*. These new competitive enterprises would find it all the easier to compete.³ Even trusts to which the exclusiveness and power of capital gives some kind of monopolist position do not possess a full monopoly.⁴ Lastly, the most pregnant argument: "It is certain that cartels give rise to a restriction of free competition, but," he adds, "such restriction is inherent in every regulation, whether made by the State or by the

¹ As regards KLEINWÄCHTER, cf. pp. 12 et seq., ante; LIEFMANN, ut sup., p. 35; see p. 40, post.

² GRUNZEL, ut sup., p. 10.

³ GRUNZEL, ut sup., p. 11.

⁴ GRUNZEL, ut sup., p. 11. "Selbst den Trusts, denen die Ausschliesslichkeit und Kapitalsmacht eine Art von Monopolstellung verleihen, spricht JENKS (*The Trust Problem*, new and revised edition, New York, 1901, p. 70) nicht die volle Monopolkraft zu, indem er richtig bemerkt: 'Virtual monopoly from power of large capital seems possible, but it is not so complete as a legal or natural monopoly.' "

interested parties. It appears that it is not a specific remedy."¹

A careful perusal of the above argument will fully satisfy anyone that this whole thesis is fundamentally false. Grunzel's controversy with the monopolistic theory conveys the impression that, despite the clearness and comprehensibility of the latter, he either did not know or did not understand it. Grunzel does not reply to a single one of its arguments and, moreover, imputes a content to its statements which none of its exponents has ever expressed.

In Grunzel's opinion a full monopoly *de facto* is equivalent to a natural or legal monopoly, whereas all exponents of the monopolist theory continually and invariably explain that there is only a *partial* monopoly, proportionate to the degree of the restriction of competition. Even if sometimes a complete elimination of competition was spoken of,² it was never asserted that cartels attained thereby a *complete monopoly* of the market. It was Kleinwächter who first made it clear that there was only a partial monopoly (*ein gewisses Monopol*), a partial or relative monopoly of producers, but without which the regulation of production and adaptation to demand would be entirely unthinkable ("eine Regelung der Produktion nach dem Bedarfe ohne ein *gewisses Monopol* der betreffenden Produzenten ist absolut undenkbar"). Competition must be adequately restricted or eliminated; that is to say, control must be gained over the market. In other words: The market must be monopolized if the danger of foiling at any moment the plan of regulating

¹ GRUNZEL, *ut sup.*, p. 11. "Dass die Kartelle eine Einschränkung des freien Wettbewerbes herbeiführen, steht fest, aber eine solche Einschränkung liegt im Wesen jeder Regelung, ob sie nun vom Staate oder durch Selbsthilfe der Interessenten angebahnt wird. Das Mittel scheint mir also kein spezifisches zu sein."

² E.g. KLEINWÄCHTER, *Handwörterbuch der Staatswissenschaften* (2nd ed.), Vol. V, p. 39; LANDESBERGER, *ut sup.*, p. 296; HIRSCH, *Die rechtliche Behandlung der Kartelle*, Jena, 1903, p. 4; RUNDSTEIN, *Das Recht der Kartelle*, Berlin, 1905, p. 2; BAUMGARTEN-MESZLÉNY, *Kartelle und Trusts*, Berlin, 1906, p. 39; and many others.

production by free competition is to be averted.¹ Could Kleinwächter have explained it more clearly?

Similarly Menzel, whom Grunzel severely censures for the identification of cartels with complete monopolies *de facto*, explains by simple examples that the monopolist position of cartels is limited in accordance with the restrictions of competition; as, for instance, the impossibility of determining at liberty the price of goods, quantities to be produced, etc.²

Still more emphatically Liefmann explained in his first work on cartels how their monopolistic position is to be understood. "It is peculiar to this kind of monopoly," he pertinently observes, "that it does not presuppose the removal of competition and yet allows its members to carry out together the policy of a monopolist. Thus we can define unions of subjects of a system of exchange economy (*tauschwirtschaftliche Subjekte*) as a means of affording its members the advantages of monopolists during and despite the existence of competition."³

If Grunzel had taken the trouble to read carefully at least this last paragraph of Liefmann, he would not have risked coming forward with such criticisms. But he does not even mention Liefmann and passes over also in silence all arguments of the monopolistic theory which explain in what this *relative, qualified* monopoly of cartels consists. He tries to overthrow the latter theory by attacking non-existing arguments, never advanced by the other side, and hatched only in his imagination. It is not surprising, therefore, that he is at variance with himself in these curious operations. He says that a monopolist position is not required to effect the purpose of a cartel, at the same time admitting that it is the *ideal* of many cartels. Probably this ideal is, after all, not quite superfluous. Further, he opposes those who adduce restriction of competition as the purpose of cartels because at the utmost (*höchstens*, therefore not

¹ Cf. p. 14, ante.

² MENZEL, ut sup., p. 25. See also p. 30, ante.

³ LIEFMANN, *Die Unternehmerverbände*, Freiburg, 1897, p. 35.

necessarily) this could be merely a means to the end, viz. to the regulation of production, but at the same time he states that *every regulation of production, including such as is undertaken by cartels, imposes a limitation on the freedom of competition.*¹ Do the supporters of the monopolistic theory say anything else?

Significant also is the manner in which he makes use of other authors to buttress up his thesis. He has chosen only two, but he ably adapted them to his own views! One is JENKS, who is credited by Grunzel with a sentence stating that even trusts, owing to the exclusiveness and power of their capital, possess a partial monopoly, but have not a complete one. Grunzel quotes in his book an English text which he professes to have taken from Jenks: "*The Trust Problem*, new and revised edition," New York, 1910, p. 70.² Unfortunately, this is not to be found in Jenks, neither on page 70 nor anywhere else, neither in the edition quoted by Grunzel nor in any later edition. The sentence with which Grunzel credits Jenks runs as follows: "*Virtual monopoly from power of large capital seems possible, but it is not so complete as a legal or natural monopoly.*" Yet the sentence in Jenks next to the above reads: "This fact seems to justify the use of the expression 'capitalistic monopoly,' although, of course, one may readily concede that the power of monopoly in this case is not so complete as in the others" (p. 70). Speaking of those other cases of monopoly, Jenks refers to the legal and natural monopolies. This sentence of Jenks is in harmony with his whole explanation of the monopolistic position of trusts, which I shall consider shortly.

Apart from the inadmissibility of the alteration in the original wording of Jenks, even what Grunzel calls in evidence of his theories tells wholly against it. Grunzel explicitly states that trusts occupy "a kind of monopolist position" (*eine Art von Monopolstellung*), and thus acknowledges the possibility of a partial monopoly. This implies a differentiation between

¹ Cf. quotation in note 1, on p. 34, ante.

² Cf. quotation in note 4, on p. 33, ante.

the latter and a full monopoly; in his polemics, however, with the monopolist cartel theory he does not admit it. Further, he emphatically stresses that monopolies of trusts are not so complete as a natural or legal monopoly. Who among the advocates of the monopolist theory ever maintained that a cartel monopoly is tantamount to a legal or natural monopoly?

Professor Jenks, whose words Grunzel uses in such a peculiar way, never contradicted the monopolist theory. On the contrary, he is admittedly its supporter. Jenks devotes to this question a separate chapter in which he clearly demonstrates that American trusts possess a monopoly, and he does it in a manner *identical* with the mode of representation of the monopolistic position of cartels by the European science. *Ipsissima verba*:¹ "It is even sometimes asserted that the possession of very large capital is in itself never sufficient to secure a monopoly in any industry, *while the popular opinion clearly is that practically all of the so-called trusts*, whether recipients of these special favours or not, *possess monopolist power and are properly called monopolies*. Any differences of opinion that arise over such a question are usually differences springing from misunderstandings regarding terms. Late decisions of the courts and the common usage of later days justify the usage of such expressions—which, strictly speaking, are often self-contradictory—as 'partial monopoly,' 'temporary monopoly,' 'virtual monopoly,' etc. It should be kept in mind that these expressions themselves call attention to the difference between those conceptions and that of, let us say, a legal monopoly. In the case of a legal monopoly the monopolist has absolute control of the market and may forbid under penalty of law any competition whatever." And further we read:² "It seems to be generally conceded (at any rate the courts and

¹ JENKS, ut sup., pp. 38 et seq. ("Combination and Monopoly"), Chapter IV.

² JENKS, ut sup., p. 60.

popular usage concede it) that it is proper nowadays to use the words 'monopoly' even when the element of competition is not entirely eliminated." And in another place¹ Jenks aptly elucidated the meaning of "monopoly within certain limits" (i.e. monopoly as the word is at present used, meaning unified control sufficiently powerful to hold competitors well in check, as evidenced by the power to put prices higher than former competitive rates while still excluding nearly all competitors." Jenks represents the monopolist position of trusts exactly in the same way throughout all later editions of his work.² A combination that controls only 75 per cent. of the sale of a given commodity has secured this kind of monopoly. In the exact sense of the above-quoted sentence Jenks considers that the use of the expression "*capitalistic monopoly*" is justifiable, although this monopoly is not so complete as a legal or natural one. It is the same sentence which Grunzel arbitrarily distorted and quoted to support his own thesis, although the latter is the exact opposite of what Jenks, concordantly with prevailing science, represented.

The other author whom Grunzel calls in support of his theory is Professor PHILIPPOVICH, the eminent economist. After a very superficial criticism of all existing descriptions of the objects of cartels Grunzel dismisses them as mistaken and says: "It seems to me that the right explanation has been found by Philippovich in his definition of cartels"; but Grunzel does not quote the whole definition, which gives regulation of production and sale as the purpose of cartels.³ Had he done so, the reader would have learned what Philippovich thinks of cartels. Here is the full wording: "Cartels (unions of entrepreneurs, syndicates) are combinations of independent entre-

¹ JENKS, ut sup., p. 64.

² Also in the latest JENKS-CLARK, New York, 1922, 4th ed., pp. 61 et seq.

³ GRUNZEL, ut sup., p. 10. "Die richtige Erklärung scheint mir Philippovich gefunden zu haben, indem er 'die gemeinsame Regelung der Produktion und des Absatzes' als Zweck der Kartelle angibt."

preneurs which restrict or remove mutual competition by a *joint regulation of production or sale, thus aspiring to a monopolist control of the market.*"¹

In like manner Philippovich represents the essence of cartels in the first volume of his work. Among the economic effects of cartels is, first, "*the formation of monopoly.*" "To buyers," continues Philippovich, "the entrepreneurs brought under the cartel are a unit which has power to fix terms of sale according to its own economic interests. These entrepreneurs are in a position to control the market, to secure for themselves the largest possible profits, and to cause damage to enterprises and consumers dependent on their goods. This monopoly of cartels gives rise to counter-actions: associations of consumers, . . . state interference. . . ."²

This is how Grunzel's theory is "corroborated" by Philippovich, who emphasized the monopolistic character of cartels more strongly than anybody else.

But this is not all. In 1911 Grunzel again writes on cartels, and repeats his monopolist cartel theory³ unchanged, although in the meantime a whole string of writers had once more plainly demonstrated the monopolist character of cartels. In particular LIEFMANN had again explained in popular terms in what the nature of this "*relative Monopoly*" consists and how it should be understood. He rightly emphasized that its most distinctive trait is a monopolist control of, or at least influence upon, the market which is also the goal of the cartel; for cartels aim at as complete as possible an elimination of competition

¹ PHILIPPOVICH, *Grundriss der politischen Oekonomie*, Tübingen, 1905 (3rd ed.; the part dealing with cartels is unaltered as in 1st ed.), p. 148. "*Kartelle (Unternehmerverbände, Syndikate) sind Vereinigungen selbständiger Unternehmer, welche durch gemeinsame Regelung der Produktion oder des Absatzes die Konkurrenz unter sich einschränken oder beseitigen und dadurch eine monopolistische Beherrschung des Marktes anstreben.*" Similarity in later editions.

² PHILIPPOVICH, *Grundriss der politischen Oekonomie*, Vol. I, Tübingen-Leipzig, 1904 (5th ed.), pp. 191 et seq., § 77.

³ GRUNZEL, *Der Sieg des Industrialismus*, Leipzig, 1911.

in their market.¹ He cautioned against confusing it with the State Monopoly, in which the appearance of competition is *legally* and *in actual fact completely* eliminated. The conception of monopoly in its economic sense is wider. In the economic sense a monopoly exists when a *considerable* portion of the buyers is satisfied by *one* supplier (single monopoly) or, as is the case with cartels, by a *group* of offerers (collective monopoly).

Contemporaneously with Liefmann, many other eminent authors analysed the cartel monopoly, among them also both the "adherents" of Grunzel, JENKS in New York and PHILIPPOVICH in Vienna. The construction which they put on the essence of the cartel monopoly in the early editions of their works referred to was maintained unaltered throughout later editions. Even one who is reluctant to accept the monopolist theory cannot help understanding what its protagonists have in mind and why they regard cartels and trusts as monopolies *sui generis*.

In vain Liefmann made renewed efforts in this direction; after thirty years he reluctantly had to confess that he was unable to prevent false notions about the economic nature of monopolies from gaining ground.²

¹ LIEFMANN, *Kartelle und Trusts*, Stuttgart, 1905, p. 5. "Unter Kartellen verstehen wir freie Vereinbarungen oder—wie wir schon ausführten—Verbände zwischen selbständig bleibenden Unternehmern derselben Art *zum Zwecke monopolistischer Beherrschung des Marktes. Die Zweckbestimmung, die monopolistische Beherrschung oder doch Beeinflussung des Marktes, ist natürlich das Wesentliche in dieser Definition.*"

² LIEFMANN, *Grundsätze der Volkswirtschaftslehre*, Vol. II, "Grundlagen des Tauschverkehrs," Stuttgart, 1919, pp. 61–98 (a comprehensive treatment of the monopoly question with special regard to the relation of monopoly to competition, relative monopoly and monopolies by contract); likewise in all editions of *Kartells, Konzerne und Trusts*. In the 7th ed., Stuttgart, 1927, pp. 11 et seq., Liefmann writes: "*Trotz meiner jetzt bald 30. jährigen Bemühungen, das volkswirtschaftliche Wesen des Monopols klarzustellen, sind namentlich in der juristischen Literatur darüber noch völlig falsche Vorstellungen sehr verbreitet.*" This is repeated also in the last (8th) ed., Stuttgart,

Let us see what Grunzel has to say on this point. He pretends that he never heard of it. With unshaken self-confidence he still submits his shattered theory for acceptance. Another name was found for it. He labelled it "Koalismus," touched it up and thought it was up to date. "Koalismus," repeats Grunzel, "does not remove competition, but only 'regulates it,' in place of former anarchy it brings organization into economic life covering not solely industrial production but the whole business life with all its vocations and occupations. And, he says with pathos, former unlimited individualism was threatening capitalism with ruin through Socialism, against which it is protected by "Koalismus."¹

In 1928 Grunzel published a new book on cartels and trusts and considered it advisable to reiterate word for word, without troubling about scientific foundation, all that he had written before on the essence of cartels and trusts in defiance of the monopolist theory.² Thus he only caused unnecessary confusion.

The best of it is, however, that Grunzel himself criticizes this confusion. Says he: "The confusion will not be diminished, but only aggravated, if science—and, unfortunately, there is a scientific snobbery in the German-speaking world—endeavours to coin new words which are not generally accepted, but, on

1930, pp. 10 et seq. Cf. also LIEFMANN, "Zur Systematik wirtschaftlicher Machtstellungen," in *Kartell-Rundschau*, Berlin, 1928, pp. 398 et seq. The reproach to the German *juristic* literature is not justified. Both leading contemporaneous writers on the legal aspect of the subject, FLECHTHEIM and ISAY, unreservedly accept the monopolistic theory. The latter, after a temporary departure, in *Studien im privaten und öffentlichen Kartellrecht*, Mannheim, 1922, soon retreated under the influence of the excellent short treatise of TSCHIRSCHKY, "Der monopolistische Charakter der Kartelle," in *Kartell-Rundschau*, Berlin, 1926, pp. 325 et seq., and also the later *Kartell-Organisation*, Berlin, 1928, pp. 13 et seq. As a matter of fact, I do not know one serious writer in the German legal cartel literature who upholds a different view. Just as in the economic literature confusion is caused by writers like GRUNZEL, LEHNICH (*Kartelle u. Staat*, Berlin, 1928) and others.

¹ GRUNZEL, *Der Sieg des Industrialismus*, ut sup., pp. 114 et seq.

² GRUNZEL, *Die wirtschaftliche Konzentration*, Wien, 1928, p. 65.

the contrary, meet with more or less strong disapproval."¹ Grunzel had not the right to pronounce such a judgment upon the whole German literature on the subject. It is against him that the German science might have a well-founded grudge, for his new ideas caused much confusion.

I have devoted close attention to Grunzel for two reasons: I wanted to point out first how one of the most essential "disputable" questions—the question of the monopolistic character of cartels—arose, and secondly the scientific method employed. As I have already pointed out, and as I shall have occasion to show in several instances, a number of other so-called "disputable" questions were wholly, or to a large extent, due to the latter evil, both in the German and other literature. The disregarding of the history of the monopoly movement and the practices described above are the main causes of the shortcomings in the science of cartels and trusts.

Reverting to the anti-monopolist theory of Grunzel, it must be stated that, happily, at first it did not exert any serious influence on the science. In the year following the publication of Grunzel's first book TSCHIERSCHKY² temporarily fell a victim to it. But this was the first book by this author, who well merits the prominent position he occupies in German cartel literature. Tschierschky was soon aware that he had been misled, and in all his later publications he is an avowed supporter of the theory of the monopolist character of cartels.³ Agreeing

¹ GRUNZEL, *ut sup.*, p. 2. "Die Verwirrung wird aber nicht gemindert, sondern noch gesteigert, wenn die Wissenschaft—und leider herrscht gerade im deutschen Sprachgebiete ein wissenschaftlicher Snobismus—Neubildungen von Worten versucht, die doch nie allgemeine Aufnahme finden, sondern gerade bei Fachkollegen auf eine mehr oder minder lebhaft Abneigung stossen."

² TSCHIERSCHKY, *Kartell und Trust*, Göttingen, 1903.

³ TSCHIERSCHKY, *Das Problem der Staatlichen Kartellaufsicht*, Mannheim, 1923, pp. 71, 73 et seq.; "Der monopolistische Charakter der Kartelle," in *Kartell-Rundschau*, Berlin, 1926, pp. 325 et seq.; "Zur Frage einer Wesensänderung der Kartelle," in *Wirtschaftsdienst*, Hamburg, 1927, pp. 1441 et seq.; "Der Inhaltswandel des Kartellbegriffs

with Liefmann, he states that all cartels must actually rest on a monopolist basis, but the degree of their potential utility varies between the lowest limit of a pure norm and a complete control of the market by one. "To negative the necessity of the monopolist character of cartels is but to play with a whimsical monopoly conception formed arbitrarily" is the apposite statement of this author, who bases his excellent knowledge of cartels not only on abstract considerations but also derives it from a prolonged practice as a judge of the Cartel Court (Kartellgericht) of the German Reich in Berlin, and as the editor of the excellent periodical *Kartell-Rundschau*, which maintains a lively contact with cartel practice.¹

Grunzel's conception has also been taken up, though more independently, by Isay in his *Studien im privaten und öffentlichen Kartellrecht*, published in 1922. The confusion which then arose among German writers was rather the result of a misunderstanding. The expositions of Isay were taken as a gauntlet flung in the teeth of the monopolist cartel theory. Some had completely forgotten Grunzel and ascribed to Isay the authorship of this—as they thought—new theory,² whereas the latter und seine wirtschaftspolitische Bedeutung," in *Kartell-Rundschau*, Berlin, 1927, pp. 543 et seq.; "Zur Frage des 'monopolistischen' Charakters der Kartelle," in *Kartell-Rundschau*, 1928, pp. 434 et seq.; "Die Kartellmonopolfrage in der neuesten Literatur," in *Kartell-Rundschau*, Berlin, 1929, pp. 435 sqq.; *Kartell-Organisation*, Berlin, 1928, pp. 9 et seq.; *Kartellpolitik*, Berlin, 1930, pp. 2 and 138 sqq.; likewise in the commentary to the German Cartel-law by TSCHIRSCHKY-ISAY, *Kartellverordnung* . . ., Mannheim, 1925, pp. 41 et seq., and in the 2nd ed., Mannheim, 1930.

¹ TSCHIRSCHKY, *Der monopolistische Charakter der Kartelle*, ut sup., p. 334. "Alle Kartelle müssen auf tatsächlicher Monopolgrundmachtlage beruhen, doch schwankt der Grad ihrer möglichen Nutzbarkeit zwischen einer fast nur noch rein normativen Untergrenze und vollem, einseitigem Diktat über den Markt. . . . Einen notwendig monopolistischen Charakter der Kartelle leugnen zu wollen, bedeutet nur ein Spiel mit einem willkürlich gefassten Monopolbegriff."

² E.g. BAUER, *Die rechtliche Struktur der Truste*, Mannheim, 1927, p. 15.

did not, in principle, exclude the monopolistic character of cartels.

Isay considered that only recently, parallel with the former old cartels comprising purchase and sale, to which he never denied monopolist tendencies, a new group of cartels had arisen in the process of production which filled up the intermediate stage between the two former, comprising, that is to say, normalization (*Normalisierung*), standardization (*Typisierung*), and specialization (*Spezialisierung*); these he called "*Fertigungskartelle*." The last group, according to Isay, shows no tendencies towards a monopolistic control of the market, the definition in vogue, therefore, giving monopolistic control of the market as the *aim* of cartel is in this case inadequate. Secondly, even with these "purchase and sale cartels" (*Ein- und Verkaufskartelle*) the monopoly of the market is only a *means*, and not an aim, because the *final purpose* of all cartels is the creation of rational business conditions for its members. He therefore defines cartel as "a union of independent entrepreneurs in a certain branch of trade regulating purchase, production, and sale within this branch."¹ A few years later he repeated the same expositions.²

The defects of the above reasonings are evident. What are "*normalization, standardization, and specialization of production*"? Says Isay: "*It is plain that this activity has nothing to do with a monopolist control of the market; such a cartel may confine itself to dividing the products in question into three or four groups in order that each member may produce only those of a certain group and not all of them.*"³ Is not this

¹ ISAY, *Studien im privaten und öffentlichen Kartellrecht*, Mannheim, 1922, p. 16. "Ein Kartell ist also eine Vereinigung selbständiger Unternehmer eines Gewerbezweiges, welche den Einkauf, die Erzeugung oder den Absatz innerhalb des Gewerbezweiges regeln will."

² ISAY, "Zur Systematik des Kartellrechts," in *Gruchots Beiträge zur Erläuterung des deutschen Rechts*, 1925, pp. 13 et seq.

³ ISAY, ut sup., p. 13. "*Es liegt auf der Hand, dass diese Tätigkeit mit einer monopolistischen Beherrschung des Markts nichts mehr zu tun hat. Ein solches Kartell könne sich völlig darauf beschränken, die*

kind of cartel-contract most definitely a considerable restriction of the freedom of mutual competition? Isay himself states in another place that all three forms of cartels, i.e. the purchasing and vending cartels as well as these "*Fertigungskartelle*," have as their object to do away with the undesirable effects of free competition,¹ which, by the way, Grunzel himself did not exclude, admitting that *by its very nature* any regulation of production causes a restriction of competition. What else is restriction of competition if it is not a partial monopolization of the market commensurate with the degree of the restriction of competition? It is obvious that there is not a cartel that would not at least partly monopolize the market—otherwise it would not be a cartel. The monopolist tendency is consequently the essential, indispensable element of cartel, for it is present in every cartel and is justly stressed in the definition of cartel.

The question whether this monopolist tendency has to be treated as the *end* or *means* of the cartel is of secondary importance. It will depend entirely on the *formal* factor, whether we want to consider its immediate or ultimate aim, in regard to which the former will always be the means to the end. Since it is the undisputed final purpose of any cartel or trust to secure the highest profit to the united enterprises, the whole activity of cartels and trusts represents a *complex of means* leading to that end. "The regulation of production and sale," which many adherents of the monopolistic theory like to call the purpose of a cartel, becomes also only a means to the final purpose, i.e. to derive the largest profits from the enterprise. But to consider this final purpose in the definition of cartels, as some earlier writers did,² is at the same time insufficient

einschlägigen Fabrikate in drei oder vier Gruppen zu teilen und anzuordnen, dass jedes Mitglied nicht Fabrikate aller Gruppen, sondern nur solche einer bestimmten Gruppe herstellen darf."

¹ ISAY, ut sup., p. 15. "*Allen drei Kartellformen ist somit gemeinsam, dass sie unerwünschte Wirkungen der freien Konkurrenz zu beseitigen suchen.*"

² E.g. POHLE, ut sup., p. 11; BÜCHER, ut sup., p. 145; BAUCH, *Die Rechtsform der Kartelle*, Jena, 1908, p. 9.

and superfluous. Insufficient, because this purpose is common to all enterprises, not only cartels, and standing alone tells us nothing about them. When used together with other traits of cartels it becomes superfluous, because as a natural purpose of every enterprise it is self-evident. There remains only the means used by the cartels to attain this ultimate aim on which the definition of cartels should be based.

It might seem that there are several such means. Actually there is only one: *restriction of competition*, either complete or partial. All the rest is merely a *direct consequence* of applying this means. The bare fact that a *considerable* majority of the competitors, not necessarily all of them, in a certain market suddenly limit their former unrestricted economic liberty in an agreed manner and cease competing in a defined area, thus automatically bringing about a commensurate stabilization of conditions, constitutes the regulation of production and sale. We then speak of the area in which competition between members of the cartel has been excluded as being *monopolized*; the monopoly established in this limited area is absolute; that is to say, nobody may violate it—the cartelized entrepreneurs because of their mutual obligations, and possible outsiders because of the economic power wielded by the cartel. The use of the expression “*monopoly*” is, therefore, justified. Such a monopoly is an *automatic, natural*, and inevitable consequence of *every* restriction of free competition and at the same time it is the *indispensable* condition of attaining and maintaining the regulation of production and sale. Without it no regulation could be introduced or maintained. The cartel must have the certainty that its economic plans will not be foiled. A cartel which did not succeed in securing such a monopoly might be an *attempted* but never an actual cartel. Likewise, a cartel that loses monopoly during its existence owing to new competition ceases to be a cartel proper and, as a rule, collapses.

The above analysis plainly shows that the sole essential trait of every cartel is this *immediate purpose*: restriction of

competition which monopolizes the market. This is the key to everything; on it the economic policy of cartels is based. Those definitions of cartels and trusts, *sensu largo*, are undoubtedly most pointed which lay stress on this restriction and not merely on the regulation of production which is its result only. Secondly, the expression "regulation" of production and sale, or of competition as some would say, or even of the market as others would prefer to say, is too vague, half-hearted, and, if I may say so, not sincere. Why not use plain language and say that it is restriction of competition? This has the advantage of saying at the same time how such regulation is effected, and removes any possibility of the expression "regulation" of production and sale being mistaken for a reference to the regulations which every large enterprise, whether cartel or not, must observe within its own organization.

The adjunct, "*the monopolization of the market*," could be considered as not essential, since it is implicit in every restriction of competition. To include it in the definition of cartel or trust is, nevertheless, desirable, as it is an aid to a clearer conception of their essence. Further, this view stands out most distinctly from that of those who deny the monopolistic character of cartels and trusts, and, as we have seen, *per fas et nefas*, avail themselves of every opportunity to read others as interpreting the problem in the same manner as they do; such persuasive methods are used to add to the number of "supporters" and to strengthen their own theories.

Isay later came to the conclusion that he was mistaken. He takes Liefmann's definition of cartels as the basis for his latest essay on the subject and adds that cartels are the opposite of free competition and aim at its removal or restriction.¹ He does not even mention his former views.

¹ ISAY, *Die Entwicklung der deutschen und ausländischen Kartellgesetzgebungen*, Berlin, 1930, pp. 3 et seq. On p. 4: "*Kartelle sind ein Gegenstück zum freien Wettbewerb. Sie wollen den Wettbewerb zwischen den Unternehmern auf dem Markte beseitigen oder beschränken.*"

Unfortunately, the conception so unhappily initiated by Grunzel remained. And, what is still worse, since 1926 it has been taking root, wielding the argument adduced by Isay that the sole purpose of the newest cartels which have been called "*Spezialisierungskartelle*" and "*Fertigungskartelle*" is improvement of production *without monopolistic tendencies*. The old monopolistic definition, they say, does not cover these cartels and is, therefore, insufficient and has to be modified towards the blank expression *regulation* of production, indicated already by Grunzel as the purpose of cartels.¹

There are also those who, like SPRUNG,² SCHMITT-SCHOWALTER,³ BAUER,⁴ or LEHNICH, repeat Grunzel's theory in its classical, unadulterated form. Lehnich is at variance with himself and his inconsistency is more gross than that of Grunzel, although he is not aware of it; he gives "*regulation of the market and restriction of competition*" as the *purpose* of cartels ("zum Zwecke der Regelung des Marktes und Beschränkung des Wettbewerbs") and at the same time states: "I do not consider the monopolistic control of the market to be the pronounced purpose of cartels. Wherever virtual cartels are formed there is a *regulation and weakening of the competitive struggle*. The fact that cartels *can fulfil their task only if the circle of the firms in question is closed and that for this reason a monopolistic powerful control is desired for cartels* which regulate production, does not

¹ E.g. MÜLLENSIEFEN, *Kartelle als Produktionsförderer*, Berlin, 1926, p. 10.

² SPRUNG, *Das Kartellproblem und die Bankenverbände*, Wien, 1920, pp. 11 et seq.

³ SCHMITT-SCHOWALTER, *Organisationsformen der modernen Wirtschaft, Konzerne und Kartelle*, 1926, pp. 17 et seq., criticizes the monopolistic definition of Liefmann and accepts that of Kleinwächter, being unaware of the fact that the monopolistic ideas of both writers tally!

⁴ BAUER, *Die rechtliche Struktur der Truste*, Mannheim, 1927, pp. 15 et seq. On p. 17: "Das Monopol oder eine ähnlich gelagerte wirtschaftliche Situation ist weder dem Begriff des Trustes noch des Kartelles wesentlich."

alter the purpose of cartels.”¹ What an unusual reasoning! Cartels aim only at a restriction of competition and not at a monopolization of the market because they fully effect their purpose *only when* they gain a monopolistic control over the market. On the face of such reasoning it is needless to enlarge on the fact that Lehnich does not comprehend the meaning of “*restriction of competition*,” which, together with a “*regulation of the market*,” he himself declares as the purpose of cartels.

At the same time, he declares that the essential feature of agreements of entrepreneurs which are formed to make use of favourable market conditions and a preponderance of supply is monopoly of the market. This is, according to him, the fundamental difference between these monopolistic unions and cartels proper, the latter being merely “a reaction against the principle of free competition arising only when too large a production has to be adapted to requirements.” Thus, unions of entrepreneurs who, owing to a preponderance of demand, are certain of a *complete* sale of their goods and good prices without the aid of cartels, *must* monopolize the market if they want to increase their profits still more; whereas unions of producers who, owing to an overproduction, cannot find an outlet for their goods and are on the verge of bankruptcy are able to command the situation *without dominating* the market! Such are the deplorable conclusions of an *a priori* accepted anti-monopolistic theory of cartels.

Finally, there are some who go still farther and maintain that an upheaval took place in the essence of the cartel organization. The activity of cartels is at present directed towards a fundamental change of the economic structure, and not merely

¹ LEHNICH, *Kartelle und Staat*, Berlin, 1928, p. 41. “Die Tatsache, dass die Kartelle—wie noch zu zeigen sein wird—ihre Aufgaben vollkommen erst dann erfüllen können, wenn der Kreis der in Frage kommenden Firmen geschlossen ist, und dass aus diesem Grunde insbesondere den Kartellen, die die Produktion regeln, eine monopolistische Machtstellung sehr erwünscht ist, ändert nichts an dem Zweck der Kartelle!”

towards a correction of the defects of the present system. The old definitions of cartels as given by Liefmann became, therefore, obsolete.¹

This whole hopeless controversy about the essence of cartels has a depressing effect on the reader. It springs from a complete ignorance or perhaps inability to comprehend the simplest arguments of the monopolistic theory and was from the start doomed to failure. None the less, and against all expectation, these polemics not only do not cease but, on the contrary, become more heated. It is sufficient to glance through some articles in the Berlin *Kartell-Rundschau* since about 1927 to see what tremendous dimensions the discussion assumed, resembling in the arguments advanced by the opponents of the monopolistic theory such trivial problems as were seriously discussed by medieval Scholastics: How many angels could go on the point of a needle? Moreover, recently some lawyers have striven to find a special *legal* definition of cartels, as the economic definition does not meet the special needs of the legal intercourse they say.² As if there were besides economic cartels some "*legal*" cartels! How harmful and dangerous for science and practice these polemics are is best evidenced by the fact that the simple and clear question of the essence of cartels is to-day in German literature a most disputed problem.

Some explain this stubborn resistance of the opponents of the monopolistic theory by the fact that they favour the cartel

¹ BECKERATH, "Der Inhaltswandel des Kartellbegriffes," in *Wirtschaftsdienst*, Hamburg, 1927, pp. 1119 et seq. TSCHIRSCHKY, "Zur Frage einer Wesenänderung der Kartelle," in *Wirtschaftsdienst*, 1927, pp. 1441 et seq., disputes with the former.

² WUNDERLICH, "Zum Kartellbegriff," in *Kartell-Rundschau*, 1928, pp. 339 et seq.; HAUSSMANN, "Der Kartellbegriff," in *Kartell-Rundschau*, 1928, pp. 416 et seq. CALLMANN, "Der Kartellbegriff und § 1. K.V.O. . . .," *Kartell-Rundschau*, Berlin, 1932, p. 215, criticizes the discrimination of a special *legal* conception of cartels and pertinently remarks (p. 216): "Recht und Wirtschaft stehen im Verhältnis von Form und Inhalt zueinander." KLINGER, *Die Rechtsprechung des Kartellgerichts*, Berlin, 1930, p. 2.

movement and desire to free cartels from the interference of the State.¹ If this reproach be true it would no longer be a science but a political platform.

It may be stated with satisfaction that, for all that, by far the larger number of writers in the newest German cartel literature, among them all the leading writers, such as FLECHTHEIM, TSCHIERSSCHKY, LIEFMANN, ISAY, and others,² do not negative the monopolistic tendencies of cartels and trusts but acknowledge their qualified monopolistic character. This view prevails among both economists and lawyers.³

¹ WOLFERS, "Über monopolistische und nichtmonopolistische Wirtschaftsverbände," in *Archiv f. Sozialwissenschaft u. Sozialpolitik*, 1927, Vol. 59, p. 293.

² FLECHTHEIM, *Die rechtliche Organisation der Kartelle*, Mannheim, 1922, 2nd ed., pp. 5 et seq. On p. 7 he correctly observes that monopolistic tendencies are "immanent dem Kartellwesen." The respective works of Tschierschky, Liefmann, and Isay are cited above. MANNSTAEDT, *Ursachen und Ziele des Zusammenschlusses im Gewerbe*, Jena, 1916, pp. 73 et seq.; WAGENFÜHR, "Die Stellung der Kartelle in der Volks- und Weltwirtschaft," in *National-Wirtschaft*, Berlin, 1927-1928, pp. 593 et seq., and 798 et seq.; STARK, *Die Theorie der Kartelle*, Berlin, 1930, pp. 4 et seq.; VANONI, *Zur Begriffsbestimmung der Kartelle und Konzerne*, Heidelberg, 1931, pp. 40 et seq.; WOLFERS, *Das Kartellproblem im Lichte der deutschen Literatur*, München/Leipzig, 1931, pp. 35 et seq.; FELDMANN, *Kartelle, Trusts und Monopole*, Basel, 1931, pp. 17 et seq.; CALLMANN, "Der Kartellbegriff und § 1 K.V.O. . .," ut sup., Berlin, 1932, pp. 215 et seq., 219 and 224.

³ The monopolistic character of all cartels was, in addition to the authors quoted above, emphasized especially strongly by the well-known economist SCHMOLLER, "Die wirtschaftlichen Kartelle, Verhandlungen d. Vereins f. Sozialpolitik über Kartelle," Leipzig, 1895 (*Schriften d. Vereins f. Sozialpolitik*, Vol. 61, p. 235); VOGELSTEIN, *Die finanzielle Organisation der kapitalistischen Industrie und die Monopolbildungen, Grundriss der Sozial-Oekon.*, Tübingen, 1914, p. 225. To a certain extent also SOMBART, *Der moderne Kapitalismus*, Leipzig, 1927, Vol. III, p. 531: ". . . zu fortgesetzter Regelung der Marktverhältnisse ihres Gewerbes mit konkurrenzausschliessender Tendenz."

Among the legal bibliography (general works) have to be mentioned :

The differences occurred, and to some extent still occur, merely in the construction of this monopolistic character. Some speak directly of a monopolistic *control* of the market ("*monopolistische Beherrschung des Marktes*"); others recognize only a monopolistic *influence* on the market ("*monopolistische Beeinflussung des Marktes*"). This gave rise to a heated controversy in the German literature between the supporters of the monopolistic theory, which still continues, I think, quite uselessly. A lot of time and paper was wasted owing to a misunderstanding. None of those protagonists of the monopolistic theory who spoke, and still speak, of a monopolistic control of the market ever had in mind an *absolute* control. And between a *relative* "*control*" and *absolute* "*influence*" on the market there is no difference. Therefore LIEFMANN, although he replaced his old expression "*Beherrschung des Marktes*" by "*Beeinflussung des Marktes*," rightly remarks that one can safely speak of "*control*" of the market, for there is always hidden the intention to establish a *control*.¹ Of course this means *only a relative* control of the market. Competition can *never be completely* eliminated.

Despite the clearness of this question, some either did not want or perhaps could not understand this and maintained that there is a *material* difference between control of and influence on the market. Thus, it was argued, the popular definition of Liefmann required amendment. Lack of a sense of reality and economic common sense were ascribed to those who would not concede that the definition of cartels as given by DÜRINGER-HACHENBURG, *Kommentar zum H.G.B.*, Mannheim, 1917, p. 305 et seq.: "... *zwecks monopolistischer Beeinflussung des Marktes*." LEHMANN-HOENIGER, *Lehrbuch des Handelsrechts*, Berlin, 1921, 3rd. ed., p. 422: "... Sie erstreben eine *monopolistische Beherrschung des Marktes*." Similarly GEILER, *Gesellschaftliche Organisationsformen*, Mannheim, 1922, p. 32; HAUSSMANN, *Grundlegung des Rechts der Unternehmenszusammenfassungen*, Mannheim, 1926, p. 86, and a number of others.

¹ LIEFMANN, *Kartelle, Konzerne und Trusts*, Stuttgart, 1930, 8th ed., p. 11. Likewise WAGENFÜHR, *ut sup.*, p. 594.

Liefmann "definitely" does not comprise "a large circle" of cartels.¹

Considering that many could not see the wood for trees, and in view of the confusion they caused both in theory and practice, it is perhaps better that the monopolistic position of cartels is now defined almost unanimously as a monopolistic *influence* on the market, and not as its *control*. Of course, it did not in the least affect the true character of cartels. There are also some who do not speak even of a "*monopolistic influence*," but merely say "real influence" (e.g. HEXNER);² this also does not alter the fact, because an influence on the market can be "really" exerted only when competition cannot shake it—in other words, when a monopoly is established on the market. Thus is the "real influence" understood by Hexner.

Although the majority of German writers correctly described the monopolistic character of cartels, many of them expressed at the same time entirely mistaken opinions on the true nature of what has been called "*concerns*." As there are some dozens of definitions of the term "concern" in German literature, the one contradicting the other, and not one of them can be said to prevail, I have to say at the outset *which* concerns I mean, lest I might be misunderstood.

I have in mind those unions of entrepreneurs which border

¹ METZNER, "Kritische Beiträge zum Kartellbegriff," in *Kartell-Rundschau*, Berlin, 1927, pp. 77 et seq. On p. 79: "*In der Tat liegt doch erheblicher Unterschied zwischen einer Beherrschung oder Beeinflussung.*" P. 86: "*Der heute noch massgebende wirtschaftliche Kartellbegriff von Liefmann bedarf aber dringend einer Reform. Es geht vor allem nicht an und widerspricht jeder Sachlichkeit und Wirtschaftsvernunft, aus dem Liefmannschen Kartellbegriff lediglich den üblen Beigeschmack zu entnehmen und diesen auf einen grossen Kreis von Kartellen und besonders kartellähnlichen Gebilden anzuwenden die absolut nicht unter den Liefmannschen Kartellbegriff fallen.*"

² HEXNER, *Grundlagen des tschechoslovakischen Kartellrechtes*, Berlin, 1929, p. 4: ". . . um durch *wesentliche Beeinflussung* des Marktes einen wirtschaftlichen Vorteil der Teilnehmer zu erreichen oder zu sichern."

upon *cartels* proper on the one side and American *trusts sensu stricto* on the other, and form an intermediate between the developed European cartel organization and the American trust organization. These associations depend not only on a mutual agreement of its members as to production, sale, and price of their goods, but also on a strong mutual bond, both as regards persons and capital, between those enterprises which participate through mutual exchange of shares, debentures, managers, and directors, or in some other way. They comprise not only competitive enterprises on the same plane (*horizontal* combinations), but also complementary enterprises, from the raw material to the finished article (*vertical* combinations).

Owing to this tight organization which enables one consistent management and a far-reaching control of the concentrated enterprises which formally retain their independence, concerns almost tally with analogous American trusts. Formerly they were even called trusts; this name is still given to them, although they do not base their organization on a "*Board of Trustees*." The place of the latter is taken by the "*Holding Company*" (in Germany *Halte- und Kontroll-Gesellschaft*), a legal form often applied by European concerns as well as by American trusts.

The same competition that produced cartels and trusts gave rise also to concerns. Conditions of production and sale in the European markets became more and more unfavourable; overproduction and increasing competition in the first years of the present century rendered it impossible even for cartels of the highest rank with apportioned production and centralized sale to be equal to their task. In order to grapple effectively with the keen competition from outside and to maintain an equilibrium between supply and demand, as well as to secure for the cartelized enterprises the best possible profits, they had to act in strict harmony and avoid any competition between themselves. This could be achieved only

through a close union and a far-reaching mutual control of the enterprises within the cartel, i.e. through an adoption of the trust structure. Hence the slogan "*from cartels to trusts*"¹ popular at that time with German writers. It was only later that they were divorced from trusts as a separate group and were called "*concerns*." But to many authors the conception of concerns remained equivalent to trusts, as embodiments of *one* economic phenomenon, differing only slightly, not in essence but *solely in the form of their legal structure*.

In these circumstances there was good reason to believe that for all those who perceived that cartels were monopolistic at the core the transition of them to the still more monopolistic trusts would only support the accurate view of their monopolistic tendencies. However, it happened otherwise. An adverse fate did not spare even LIEFMANN, although during the last thirty years he was always unyieldingly and consistently defending the monopolistic nature of cartels. Thus, while on the one hand he leads those German writers who are fighting for the monopolistic character of cartels, and at the same time, on the other hand, he espouses the cause of those who negative this trait in *concerns* which are in my opinion but cartels rebuilt on a wider monopolistic foundation of a higher stage, and which I would briefly describe as "*European trusts*."

Yet in 1924 these concerns were represented by him as trusts; the expression "concern" was described merely as a favourite neologism of the day, and two American trusts, the *Standard Oil Company* and *United States Steel Corporation*, were adduced

¹ E.g. SCHACHT (the late President of the German Reichsbank) since 1902 exhorted repeatedly the German industries to drop the cartel form in favour of a trust organization, because the first were harmful owing to the loose cohesion of their enterprises and their incompetence to cope with foreign competition and crises. Thus, in "Trust oder Kartell?" *Preuss. Jahrb.*, Berlin, 1902, Vol. 110, pp. 1 et seq. Likewise in the controversy with GRUNZEL, who declared himself in his book *Über Kartelle*, Leipzig, 1902, in favour of cartels and against trusts. Schacht, in *Preuss. Jahrb.*, Berlin, 1902, pp. 155 et seq. said it to be "*nicht nur ein falsches sondern ein gefährliches Buch*."

as two most classical examples of concerns.¹ But now Liefmann opposes the very same concerns to trusts as being fundamentally different.

And queerly indeed is this difference construed: *concerns are not of a monopolistic character; trusts are also concerns, but with a monopoly.*² Therefore concerns which during thirty years were treated by him as a "*modern and favourite*" synonym for trusts, are now taken out of the common chapter on trusts, and are dealt with under a separate heading: "Concerns and Non-monopolistic Fusions." Also for this reason he changed the title of his book; throughout six editions it ran: *Kartelle und Trusts*, since 1927 it is *Kartelle, Konzerne und Trusts*.

The surprised reader, looking for an explanation of this unexpected change of opinion, finds the following: Concerns aim at making the enterprises uniform in methods of production, administration, their commerce and finances; therefore they regulate *above all* the internal relations, whereas cartels regulate at one point or another the external circumstances

¹ LIEFMANN, *Kartelle und Trusts*, Stuttgart, 1924, 6th ed. Chap. "Die amerikanischen Trusts," p. 86. "Man nennt eine solche Zusammenballung kapitalistischer Interessen in den Händen einer verhältnismässig kleinen Gruppe von Personen oder Gesellschaften mit einem heute beliebten Modewort 'Konzern.' Die Standard-Oil-Gruppe ist aber heute keineswegs mehr der grösste Konzern in den Vereinigten Staaten."

P. 87: "Die 'Konzerne' sind also keine einheitlichen Unternehmungen sondern nur durch persönliche Beziehungen der Leiter mehrerer Gesellschaften, durch Effektenbesitz und Kontrolle zusammengefasste Interessengemeinschaften. Die grösste einheitliche Kontrollgesellschaft ist der bekannte 'Stahltrust,' die United States Steel Corporation."

For the sake of being exact it must be mentioned that the word "concern" was not novel. Of concerns in the same sense Landesberger spoke on the 26th Congress of German Jurists in 1902 (*Verhandlungen des 26. Deutschen Juristentages*, Berlin, 1902, Vol. II, pp. 298 et seq.), and he correctly remarked then that they denote a looser combination than the trust organization (*Der lockere Verband vor der Trustbildung*, p. 301).

² LIEFMANN, *Kartelle, Konzerne und Trusts*, Stuttgart, 1930, 8th ed., p. 344. See also pp. 275 et seq.

concerning the exchange of goods and form a monopolistic combination for a whole trade.

In conformity with facts, Liefmann rightly states that concerns include not only complementary enterprises (*vertical combinations, integration*), but *also* enterprises of the same kind; that is to say, competing enterprises (*horizontal combinations*) either alternative or cumulative.¹

Referring to these horizontal concerns, which above all regulate internal relations of the combined enterprises and aim at a unity, financial, commercial, administrative, and in the technique of production, it is obvious that:

First, these enterprises must before all else have banished competition between themselves and must act in perfect agreement as to production and sale. It would be a physical impossibility to form such a unity, financial, etc., between enterprises that produce hand over hand, undercut prices, and try to snatch away customers from one another. Hence these are the most important, for which the present organization is inadequate, and which, therefore, aim at a closer cohesion, financial and administrative, and a stricter mutual control so as to enable them to realize more effectively the final object of all cartels: the increase of profits for the combined enterprises.

Secondly, any regulation of the internal relations of the united enterprises is by its very nature always introduced with regard to external circumstances, with a view to strengthening the position of the cartels in the market against competition.

¹ LIEFMANN, ut sup., pp. 275 et seq. (5 Teil, "Konzerne und Fusionen"): "Die Konzerne kann man definieren als eine Zusammenfassung rechtlich selbständig bleibender Unternehmungen zu einer Einheit in *produktionstechnischer, verwaltungstechnischer, kommerzieller* und namentlich *finanzieller* Hinsicht."

P. 278: ". . . es gibt zwei Gruppen von Konzernen, solche *koordinierter* und solche *subordinierter* Unternehmungen oder, was ungefähr auf dasselbe hinauskommt, aber mehr technisch gesehen ist: *Konzerne* mit horizontaler und solche mit vertikaler Gliederung. Beides kann natürlich in denselben Konzernen, vorkommen aber zwischen verschiedenen Unternehmungen."

At any rate it is not the purpose of concerns to carry out purely technical and administrative simplifications or internal improvements of the combined enterprises that do not strengthen their competitive ability, i.e. the external position.

For that reason to contrast the regulation of internal relations with the direct regulation of external circumstances of the enterprises within the concern, as done by Liefmann, is absurd.

Liefmann speaks of "internal regulation of productive technique"; but is there any external regulation of production? Every virtual regulation of production is, by its nature, necessarily internal, its effects are always felt outwardly. Such a regulation is the object of concerns, just as it is that of cartels. In the former as well as in the latter it consists in a more or less strict limitation of competition between members—in other words, in an adequate monopolization of the market. Liefmann told and is still telling the opponents of the theory that cartels are monopolies, that the argument about the regulation of production conveys nothing definite, and that a regulation is solely possible in a monopolistic constellation. It is inexplicable why Liefmann himself makes the same mistake when speaking of the regulation of the technique of production by concerns.

The group of horizontal concerns weighs most emphatically against all arguments advanced by Liefmann. These concerns not only have a monopolistic character, but even have it in a much higher degree than all other cartels. They are most distinctly cartels that have taken on trust forms.

Now as to the group of vertical concerns: it must be emphasized here that as a rule vertical combination (integration) goes hand in hand with horizontal combination, a fact to which only a few writers have drawn attention.¹ Thus it is in Germany and in all countries with a developed industry, especially heavy industry. The vertical organization goes alone only in

¹ SAITZEW, *Horizontal und Vertikal im Wandel der letzten Jahrzehnte*, Jena, 1927, p. 10.

exceptional circumstances; but that does not disprove the rule; on the contrary, it confirms it. This mixed framework which combines the horizontal and vertical organization is perhaps the most typical external (*formal*) trait of concerns. And so the structure of concerns suggests itself as a vertical web of subordinate and superior cartels covering raw material, semi-manufactured products, and finished articles.

It is altogether unthinkable that production and sale could be effectively regulated in any industry, even only with a view to lowering costs and improving the process of production, unless all or the majority in a certain branch of industry reach an agreement on the common measures to be taken; in other words, unless they form a *cartel*. Only later in order to attain more independence in the market and lower the cost of production, a vertical extension upwards and downwards from raw material to the finished product can follow. Otherwise, if only each several enterprise in a given branch were to develop vertically, competition would not cease, but being carried on with heavier arms it would become more violent and destructive. In such circumstances any regulation of production, rational lowering of its cost in a given industry, etc., is not conceivable. Perhaps eventually some stronger or more clever competitor would emerge victorious from the fight, but it is more likely that all of them and the whole industry would be ruined. This is, therefore, altogether outside the scope of our subject-matter, though many writers, especially the Italian ones, do not see that.

We have to bear in mind that we are dealing with *combinations* of entrepreneurs that aim at a regulation of production and sale in all branches of industry, as only such regulation may make the several enterprises pay their way permanently. One enterprise which has been extended vertically quite independently can interest us here only so far as in extremely rare cases it could *alone*, owing to its predominance over competitors in a given branch of industry, and in the absence of an

agreement with the latter, exert a decisive influence on its development and regulate it. Such a *concern*, however, may exist in theory but not likely in practice. Further, this would not be a concern proper, as the latter comprises a whole set, a group of large enterprises and not *one* large enterprise with its own auxiliary establishments that furnish it with the necessary raw materials, etc.

Hence we may assume that there is no *concern proper* that does not base its organization on *one cartel at least*. Besides, this is quite a natural and evident sequel of the fact that concerns and trusts, in Germany as well as in other countries, arose from the cartel organization and are merely a higher form of their development, adapted to more difficult competitive conditions, to which the original cartel organization often proved inadequate.

Liefmann himself disputes in another place in his book (what a pity that he did not do it in the chapter on concerns) the frequently repeated view that cartels are an organization "out of date," ousted to-day by concerns, trusts, fusions, and the like, and rightly calls it utterly mistaken. "True is only the statement," writes Liefmann, "that it has been more generally realized that cartels *alone* became insufficient, that alongside of them and even far beyond them closer unions, especially financial ones, became necessary to cope with the enormous difficulties of the present German economic life. On the other hand, it is obvious that cartels, being the sole monopoly form applicable to the big industries with many scattered enterprises, *cannot be dispensed with.*"¹ To confirm this Liefmann adduces

¹ LIEFMANN, ut sup., pp. 124 et seq.: "Wenn man . . . von einer 'Kartellmüdigkeit' in der Grossindustrie und sogar davon gesprochen hat, dass die Kartelle den Höhepunkt ihrer Entwicklung überschritten hätten, dass sie veraltete Organisationen seien, und dass man sie immer mehr durch finanzielle Zusammenschlüsse, Interessengemeinschaften, Fusionen, Trusts ersetzen müsse, so ist das durchaus unzutreffend und beruht auf falscher Verallgemeinerung der Vorgänge in einzelnen, besonders in die Augen fallenden Industrien. Richtig ist nur, dass das Bewusstsein immer allgemeiner wurde, dass die Kartelle allein nicht genügten, dass neben ihnen und über sie hinaus

a number of examples taken from the present organizations of the most important branches of the big industries in Germany,¹ which incidentally is a generally known fact.

It is clear that these mixed *horizontal-vertical* concerns are but the same old *monopolistic* cartels. They only limit more strictly, or even utterly exclude, the economic independence of their members, and thereby also their mutual competition, whereby, of course, their monopolistic character not only does not vanish, but, on the contrary, becomes *considerably intensified*. Their vertical structure ensures them particularly against all undesirable fluctuations in the price of raw materials following an increased demand. Further, controlling the production of raw material they are more successful in keeping the competitors in check and rendering the formation of new competitive enterprises more difficult. In this way, indirectly, a further restriction is imposed on competition and a more thorough monopolization of the market follows. This group of concerns reveals with still greater clearness than the former the fallacy of Liefmann's assertion that concerns are not monopolies and that they differ therein from cartels and trusts.

Still more unusual and inexplicable are the inconsistencies into which Liefmann falls when representing the monopolistic character of trusts. His whole teachings (and also the systematic arrangement of his book, *Kartelle, Konzerne und*

noch engere Formen des Zusammenschlusses, namentlich in finanzieller Hinsicht nötig wurden, um den ungeheuren Schwierigkeiten des heutigen deutschen Wirtschaftslebens einigermaßen gewachsen zu sein. . . . Andererseits ist klar, dass die Kartelle als die einzigen monopolistischen Organisationen, die für sehr grosse Industrien mit vielen zerstreuten Unternehmungen in Betracht kommen, gar nicht entbehrt werden können."

¹ LIEFMANN, ut sup., p. 125: "*Wie wenig auch in der Schwerindustrie trotz aller finanziellen Konzentrationen die Kartelle entbehrt werden können, dafür ist die neuere Entwicklung der deutschen Eisenindustrie ein Beweis.*" For more instances see pp. 87 sqq., 278, 285 sqq., 294, etc.

Trusts) are founded on the belief that cartels are monopolistic but concerns are non-monopolistic, and trusts are a combination of both forms, being *nothing but monopolistic concerns*." He emphasizes that "*the monopolistic object is the most important factor with trusts*, in which they approach cartels. He rightly remarks (against his own theory on concerns) that *trusts are in many respects a continuation of cartels, the effects of which they manifest often more strongly*.¹ Liefmann expresses the above view several times in his book, emphasizing that a monopolistic tendency is the *essence* of trusts, and therefore they may be juxtaposed with cartels. He explains that this monopoly is, as with cartels, not absolute.² To express oneself "with scientific clearness and accuracy"—according to Liefmann—the expression "Trust" has to be avoided and replaced by "*monopolistic fusion*" or "company exerting *monopolistic* control." (An entirely false view.)³ 'The chief advantage of trusts as a monopoly is adaptation of production to demand, and the weakening of business fluctuation, and although trusts surpass

¹ LIEFMANN, ut sup., p. 14: "... ein *Trust* ist daher nichts anderes als ein *monopolistischer Konzern*. Weil auch bei den *Trusts* der monopolistische Zweck das *wichtigste ist*, haben sie auch manche Berührungspunkte mit den Kartellen. Sie sind daher in vieler Hinsicht als eine *Weiterbildung der Kartelle aufzufassen und zeigen deren Wirkung vielfach in noch verstärktem Grade*."

² LIEFMANN, ut sup., pp. 344 and 278.

³ LIEFMANN, ut sup., p. 345: "Will man sich jedoch wissenschaftlich klar und korrekt ausdrücken, so tut man besser, das Wort '*Trust*' zu vermeiden, und wird je nach der Art des Zusammenschlusses von *monopolistischer* Fusionen oder *monopolistischer* Kontroll-gesellschaft sprechen."

Liefmann forgets that as German cartels so *trusts sensu largo* denote in America and England any form of combinations of entrepreneurs for the restriction of competition, not only those organized in the legal form of "trust," or only of those in the form of the "Holding Company" or "fusion"—as Liefmann says. Fusion is altogether wrongly reckoned by Liefmann among trusts (a mistake made by many writers), because if a *fusion* takes place, there is only one enterprise, and not, as is every trust which we have in mind here, a *combination of enterprises*.

cartels in this respect, the latter, if compact, may act with equal effectiveness.”¹

In the same part of his book on trusts Liefmann also states that only “*original*” trusts were formed with the object of a monopoly. This is no more the case with trusts to-day; they are formed now *with a view to removing mutual competition and to lowering cost of production so as to fight third parties more effectively*. Consequently, the majority of what are called trusts to-day does not represent *monopolistic organizations; and for that reason they should not be compared with cartels which always are monopolies*.² Without seeing the original one could hardly believe that this could have been written on trusts. Moreover, it is the very Liefmann who enjoys the reputation of being an authority on the subject, and who in another place says something directly opposite about these trusts (without discriminating between “original” and “present” ones) and cartels.

Liefmann, who during thirty years taught and still teaches his stubborn opponents that every mutual restriction of competition, and all the more its *removal* (“*zu beseitigen*”), must needs lead to a *monopoly*! What else have these “original”

¹ LIEFMANN, ut sup., p. 365.

² LIEFMANN, ut sup., p. 349: “Während aber die *ursprünglichen* Trusts *alle zu monopolistischen Zwecken* geschlossen wurden, ist das bei den Bildungen, die man jetzt als Trusts bezeichnet, *längst nicht mehr immer der Fall*. Es können sich auch mehrere Unternehmungen zu einer Gesellschaft zusammenschliessen, *ohne das dabei monopolistische Zwecke in Betracht kommen, nur um die gegenseitige Konkurrenz zu beseitigen und durch Verbilligung der Produktionskosten desto besser gegen Dritte kämpfen zu können*. Ebenso kann sich eine Holding Company auch bilden, nur um einige Unternehmungen eines Gewerbes in dieser Form zusammenzuschliessen, *also ohne monopolistische Tendenz*. Beides ist auch entsprechend der Tendenz zur Bildung grosser, einheitlich geleiteter Unternehmungen und Interessengruppen in grösstem Umfang geschehen, und *die meisten der heute sogenannten Trusts stellen daher keine monopolistischen Organisationen dar, können also auch mit den Kartellen, welche stets solche sind, nicht verglichen werden!*”

trusts done? Have they not restricted competition so as to "fight more effectively with third parties"? Liefmann subconsciously feels that this somehow is not quite right, but not strongly enough to realize that he is mistaken, and therefore looks for a remoter explanation. He asks himself significantly: "How is it possible that such combinations of entrepreneurs without monopolistic features are called 'trusts'?" Forgetting that the problem does not depend on the *name* trust,¹ he gives the following answer: "This is easily explained. A cartel

¹ In America or England nobody ever said that the conception of "trust" applies only to combinations of entrepreneurs restricting competition. Thus, for instance, HART ("What is a Trust?" in *The Law Quarterly Review*, London, 1899, Vol. XV, pp. 294 et seq.) explains: "*A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation.*" Similarly *The Draft Civil Code of the State of New York*, 1865, § 1168: "A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another."

The same meaning is brought out by a number of judicial decisions carefully compiled by HART, *ut sup.*, pp. 294 et seq.

Thus, for instance, the *National Gallery* in London is managed by Trustees; Liefmann might as well ask why, since it does not show any monopolistic tendencies. The legal institution of trust as such has nothing to do with economic combinations of industrialists or merchants.

Even the word "cartel" (*Kartell*) has several meanings; it is not confined to economic unions of entrepreneurs that restrict mutual competition. So we have *political* cartels, etc. By way of parenthesis it may be remarked that a list of dances at a wedding of the Hohenzollerns in 1598 was called also "cartel"; it does not, however, follow that we should meditate on it when discussing economic cartels regulating production and sale. One of the latest German writers (VANONI, *Zur Begriffsbestimmung der Kartelle und Konzerne*, Heidelberg, 1931, Heidelberg Studien aus dem Institut für Sozial- u. Staatswissenschaften, Bd. II, Heft 1) holds a different view, however, and mentions this "dancing cartel" (pp. 7 et seq.) and other similar ones in his book on economic cartels; evidently he considers that such a pedigree of the mere word "cartel" will lead to a better understanding of the conception of economic cartels.

without monopoly is nothing, it is a combination existing only on paper. But a combination of more enterprises effected through a fusion or 'control company' produces very important economic effects outwards, even if it has no monopoly. The most important economic effects of American trusts *do not at all lie in the field of monopolies*, but are connected with the founding, financing, and managing of large companies; thus they exist even if such a company has no monopoly. This is the case with the majority of what, in America, are being called trusts"¹

Thus a cartel without monopoly may exist only on paper, and trusts, being merely a stronger, more compact form of the same cartels, and consequently being in a much higher degree monopolistic and realizing the same objects with more effective instruments, have as a rule no monopoly to-day. The purpose of "present" trusts, according to Liefmann, is only to "*found, finance, and administrate large companies*"—and not a monopoly. Setting aside the fact that this does not define the purpose of trusts, and that no limit is drawn between those "*original*" and "*present*" trusts, and that he does not give any practical instances of either of them, although this differentiation has been repeated for a number of years throughout the editions of his book on cartels and trusts, we should like to repeat the questions we have already put with regard to concerns: Is a common uniform administration, financial or other, of the competing enterprises (the vertical structure is only complementary to the horizontal one) possible without a prior far-reaching restriction or even elimination of competition? Is an effective regulation of production or sale possible without it? And this is done by every cartel and trust with a view to keeping up or increasing the profits of the combined enterprises endangered by an excessive competition. Does not this amount to a monopolization of the market? In the same book, Liefmann pleads in one chapter

¹ LIEFMANN, *ut sup.*, p. 349.

on behalf of the same natural economic law which in another he opposes, employing arguments taken from the pages of his beaten opponents.

No wonder that the final conclusions at which he arrives here sound almost sensational and incredible. Says he: "*No doubt, the development towards monopoly organizations is with us much more advanced than in America; competition is with us in a larger number of industries removed or more strongly restricted than in the United States!*"¹ Naturally, Liefmann does not quote any sources or bibliography; this method is applied throughout the book with some small exceptions. Liefmann would like to be himself the new and infallible source in the science of cartels and trusts; he does not deem it advisable to mention that the whole American and English literature almost unanimously considers trusts, whether "*original*" or in their present forms (but without this subtle discrimination), as combinations of a decidedly monopolistic character, similar to European cartels but manifesting this trait in a higher degree.

Anticipating the reproach of "primitive originality" by the above writer, we call in evidence one of the most distinguished economists of America, Professor FETTER, the past President of the *American Economic Association*. He says in his latest book on trusts: "When we cast our eyes over the wide field of inter-state commerce in the United States, *do we see a system of free markets and competitive prices in accord with the ideal of Anglo-Saxon law?* Do we find that, during forty years, the Sherman Anti-Trust Act and the later supplementary legislation have been so interpreted and enforced that *industrial combinations and conspiracies having substantial monopoly powers have been impossible to form and to operate?* Instead, everywhere we see the growth of little-hindered combinations of formerly

¹ LIEFMANN, ut sup., p. 349: "Es ist kein Zweifel, dass die Entwicklung zu Monopolorganisationen bei uns weiter vorgeschritten ist als in Amerika das in einer grösseren Zahl von Industriebereichen bei uns die Konkurrenz mehr beseitigt oder stärker eingeschränkt ist, als in den Vereinigten Staaten!"

separately owned enterprises. Everywhere we see systems of basing-point delivered prices in great industries, foreign and domestic dumping of products, chaotic, and, at times, anarchical discrimination in industrial prices, all convincing evidences of monopolistic powers. Not that the prices extorted are unlimited—for neither are the powers of restraint. But *in every direction the sale of the necessities of everyday life is controlled by great monopolies to which the public must meekly pay tribute.*"¹ At the above conclusion Fetter arrives in an entirely different way to Liefmann, for his statement is the outcome of an exhaustive, careful, and scientific examination of the conditions prevailing in the United States.

The statement of Fetter may be regarded as the opinion prevailing among American and English writers on trusts. For in the way he depicted the monopolistic character of trust it has always been understood by nearly all American writers. They are bringing under the conception of trusts all possible forms of agreements and combinations of entrepreneurs that restrict competition; from the primitive price-fixing cartels to the most complicated concerns and trusts, whether grouped vertically or horizontally.²

¹ FETTER, F. A., *The Masquerade of Monopoly*, New York, 1931, pp. 426 et seq.

² COOK, *Trusts*, New York, 1888, p. 4: "A *trust* is a combination of many competing concerns under one management, which thereby reduces the cost, regulates the amount of production, and increases the price for which the article is sold. *It is either a monopoly or an endeavour to establish a monopoly.* Its purpose is to make larger profits by decreasing cost, limiting production, and increasing the price to the consumer. This it accomplishes by presenting to competitors the alternative of joining the *Trust* or being crushed out. Its organization is intricate, secret, and subtle.

"... The term *Trust* is popularly applied to all methods of effecting a combination in trade. It is used to designate not only the most recent development and approved method of forming the combination, but also the primitive and crude contracts called 'pools.'"

DODD (Attorney to the Standard Oil Company), "The Present Legal Status of Trusts," in *Harvard Law Review*, Cambridge, Mass.,

The report of the British Committee on Trusts, 1918, presented to Parliament in 1919, admits that the condition of affairs obtaining in Great Britain is similar to that in America; it reads: "... We find that there is at the present time in every important branch of industry in the United Kingdom an increasing tendency to the formation of Trade Associations and Combinations, having for their purpose the restriction of competition and the control of prices."¹ And recently, also, FITZ-

1893-94, Vol. VII, pp. 157 et seq.: "The term *trust* in its more confined sense embraces only a peculiar form of business association effected by stockholders of different corporations transferring their stocks to trustees. The Standard Oil Trust was formed in this way. . . ."

P. 158: "The term *trust*, although derived as stated, has obtained a wider signification, and embraces every act, agreement, or combination of persons or capital believed to be done, made or formed with the intent, effect, power, or tendency to monopolize business, to restrain or interfere with competitive trade, or to fix, influence, or increase the prices of commodities."

The analogous opinions of ANDREWS and JENKS and other earlier authors have been represented above. Similarly the later ones, such as HIRST, *Monopolies, Trusts, and Cartels*, London, 1905, pp. 105 et seq.; RIPLEY, *Trusts, Pools, and Corporations*, New York, 1905, pp. xi et seq., p. 29 (also, 2nd ed., New York, 1916); MACGREGOR, *Industrial Combination*, London, 1906, pp. 115 et seq., 137 et seq.; MACROSTY, *The Trust Movement*, London, 1907, pp. 1 et seq.; MACGREGOR, *The Evolution of Industry*, London, 1911, pp. 196 et seq.; BROWN, *The Prevention and Control of Monopolies*, London, 1914, pp. 1 et seq. On p. 4: "I mean by a trust any large consolidated business which enjoys a monopolistic control." WILLIAMS, *Capitalist Combination in the Coal Industry*, London, 1924, pp. 13 et seq.; FITZGERALD, *Industrial Combination in England*, London, 1927, pp. 3 et seq., p. 7; GORDON, *The Problem of Trust and Monopoly*, London, 1928, pp. 4 et seq.; CLARK, D. J., *The Federal Trust Policy*, Baltimore, 1931, pp. 1 et seq.; MACGREGOR, *The Evolution of Industry*, London, 1932, 2nd revised ed., pp. 196 et seq., 217 et seq., 223 et seq. ¹ *Report of Committee on Trusts* (Ministry of Reconstruction), London, 1919, p. 2. Similarly JOHN HILTON states in *A Study of Trade Organisations and Combinations in the United Kingdom* (based upon evidence given and documents laid before the Committee on Trusts), ut sup., p. 15: "In the modern industrial and commercial world competition, which indeed never was wholly 'free,' is becoming less

GERALD carefully reviewed the several branches of English industry and stated: "*Trusts . . . have become a common feature of English industry. . . . England, the home of free trade and of capitalist individualism, has, it must be admitted, become overrun with quasi-monopolist organizations.* The movement has proceeded with remarkable momentum, and has taken two related forms—simple association and actual amalgamation. It is not difficult to account for this widespread tendency. *It has, of course, derived its primary impulse from the very natural desire to suppress competition. That desire has always existed.*"¹

It may be added with full appreciation that the English and American writers have clearly comprehended the essence of the *cartel* movement despite the chaotic and the most contradictory opinions on this subject raging in the cartel literature. To them cartels as well as trusts are symptoms of the same monopoly movement. The difference between them lies in the *method* of their activity towards the same *end*, as one of the leading authorities in the English literature, Professor Macgregor, observed.² To the developed form of the cartel syndicate,

free with each year. In very many branches of trade and industry, business concerns whose inter-competition is conventionally supposed to maintain prices at a competitive level have, *in fact, working arrangements of one kind or another which prevent competition.*" MACROSTY, *The Growth of Monopoly in English Industry*, London, 1899, demonstrates that the trust movement of to-day developed similarly in the English industry as early as the close of the past century, which is confirmed by the above-mentioned *Report of Committee on Trusts*, ut sup., p. 2.

For the analogous later Trusts movement in the several branches of British Industry, cf. the reports of the Committee on Industry and Trade, Survey of Industries, London, 1927-28.

¹ FITZGERALD, ut sup., pp. 187 et 200.

² MACGREGOR, *The Evolution of Industry*, London, 1932, p. 217: ". . . the Trust and the Cartel are both aspects of the same force of industrial combination; there is a marked *difference in method* between them."

In accord with Macgregor, another leading English writer, Professor MACROSTY, *The Trust Movement*, London, 1907, p. 1: "The one common point about all forms is the combination of several capitalists

assuming the structure of a kind of Holding Company, Professor Macgregor points justly as the transition from the pure cartel to the forms of trusts.¹ In a similar way cartels are portrayed by the American, Professor CURTIS.² Although accepting the definition of Grunzel—for in his opinion it is the widest, including all types of cartels—he passes over in silence the fact that Grunzel intended to express by his definition (though unsuccessfully) the opposite theory about the *non-monopolistic* character of cartels on which he enlarged in his book; evidently the monopolistic features of cartels are so distinguished and natural in the opinion of Curtis.

The above view prevails among French writers, though not always with the same classical clearness as is to be found

who formerly operated singly: beyond that the structure may vary infinitely; it may be for all purposes or for some only; it may include manufacturers only, or wholesalers only, or retail vendors only, or any two or all three of those classes. *The object of all forms is the same, so to regulate industry that it may become more profitable to those in whose interests it is regulated.*"

Immediately afterwards Macrosty quotes DODD's monopolistic definition of trusts (cf. p. 67, note 2, ante).

Similarly HIRST, ut sup., p. 105: ". . . the organization of Trusts and Kartells. The object of their formation is, of course, to increase profits by obtaining higher prices than can be obtained under competitive conditions. In other words, their *supreme object is to create a monopoly.*" He sees the difference only in stronger cohesion of trusts (*sensu stricto*), whereas cartels represent looser forms. Likewise CARTER, *Tendency towards Industrial Combination*, London, 1913, Chap. I; WILLIAMS, ut sup., pp. 11 et seq. and 17; GORDON, *The Problem of Trust and Monopoly*, London, 1928, pp. 4 et seq.; and others.

¹ MACGREGOR, *Industrial Combination*, London, 1906, pp. 151 et seq.: ". . . and thus varying from the pure Cartel, *we obtain types which tend toward the marginal forms of Trusts.*"

² CURTIS, *The Trust and Economic Control*, New York, 1931, pp. 401 et seq.: "We may accept for our purposes the definition given by Grunzel" . . . "*feature of a cartel is that it is monopolistic in its essence—i.e. it tries to embrace the entire industry of trade—so as to present a united front to the consumer of the finished product or to the seller of the raw material or semi-manufactured product, according to the object of the organization.*"

among the English and American authors.¹ In the French literature one also meets with voices such as those of Grunzel and Liefmann.²

An analogous standpoint is taken up by the German Cartel Act of 1923. It embraces not only cartels *sensu stricto*, but

¹ RAFFALOVICH, *Les coalitions de producteurs et le protectionnisme*, Paris, 1889, pp. 22 et seq.; CLAUDIO-JANNET, *Des syndicats entre industriels . . .*, Paris, 1894, pp. 12 et seq. and 24 et seq.; BROUILLET, *Essai sur les ententes commerciales et industrielles*, Lyon, 1894; DUCHAÎNE, *La question de trusts*, Bruxelles, 1900, pp. 31 et seq.; DE ROUSIERS, *Les syndicats industriels de producteurs*, Paris, 1901, pp. 125 et seq.; MARTIN SAINT-LÉON, *Cartells et trusts*, Paris, 1903, pp. 17 et seq. and 21 et seq.; DE LEENER, *Syndicats industriels*, Bruxelles, 1904, pp. 9 et seq.; *Les rôle des Trusts*, Bruxelles, 1906, pp. 4 and 93 sqq.; CHASTIN, *Les trusts et les syndicats de producteurs*, Paris, 1908, pp. i sqq. On p. ii we read: "Toutes ces sortes de coalitions (scil. all cartels and trusts) poursuivent en réalité le même but, maintien ou relèvement des bénéfices industriels par la restriction de la concurrence. Les différences de formes s'expliquent soit par l'époque de leur apparition, soit par la nature même de l'industrie." MICHEL, *Le contrôle économique des sociétés et ses rapports avec leur nationalité*, Poitiers, 1923, p. 197: "Alors nous constatons que ces phénomènes économiques de contrôle, sous quel que forme qu'ils se présentent, contrôle par fusion, par entente ou par possession d'actions, ont toujours pour but de constituer aux mains d'un individu ou d'un groupe une force qui doit leur servir à perfectionner leurs méthodes techniques et financières de production, à dominer le marché et à imposer leurs prix, à acquérir si possible le monopole de fait." MAZEAUD, *Le problème des unions de producteurs devant la loi française*, Paris, 1924, pp. 112 et seq. On p. 115: "Elles (scil. les unions volontaires) se groupent en trois catégories: les cartels, les trusts et les Konzern. Les cartels sont les unions dans lesquelles la liberté de producteurs n'est limitée que sur certains points déterminés à l'avance. Dans les trusts au contraire les producteurs unis sont soumis à une seule autorité qui ne laisse en rien subsister leur liberté d'action. Quant aux konzern, ce sont les unions à la fois horizontales et verticales; à la concentration proprement dite elles ajoutent l'intégration"; *Le régime juridique des unions d'entreprises en France*, Paris, 1926, pp. 7 et seq.; and others.

² E.g. PAYEN, *Les monopoles*, Paris, 1920, pp. 4 et seq. (a French edition of Grunzel's theory); JANIN, *Les sociétés de participation au point vue économique*, Paris, 1928, pp. 71 et seq. and 81 et seq. (a blending of Liefmann's "concerns" with Pantaleoni's theory, see pp. 77 et seq., post).

also trusts and all combinations of entrepreneurs in general, which regulate production or sale in whatever way and occupy an "economic powerful position" in the market ("*wirtschaftsrechtliche Machtstellung*"). This found its expression also in the title of the ordinance: "*Act against the Abuse of Economic Power.*"¹ The ordinance does not attach any importance either to the various names of those combinations or the form in which they are organized. It perceives its essence in the fact that they occupy a "powerful" position in the market. The draftsmen of this Act considered that without having secured such a position these unions could not exist; they could not exert any influence on the market, whether good or bad. The technical expression for such a "powerful" position is "monopoly," as the opposite of a state of free competition. The Act, however, not without good reason, avoids "monopoly" to evade all those "doubts" which "theoreticians" may have as to the import of this expression. But "doubts" were not cleared up; quite the contrary, they only increased. There are some writers even who, from the avoidance of the expression "monopoly," draw the false inference that the cartel Act did not express itself on the monopolistic tendencies of cartels.²

¹ *Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen* (vom 2. November 1923), § 1. "Verträge und Beschlüsse, welche Verpflichtungen über die *Handhabung der Erzeugung oder des Absatzes*, die Anwendung von Geschäftsbedingungen, die Art der Preisfestsetzung oder die Forderung von Preisen enthalten (*Syndikate, Konventionen, Kartelle und ähnliche Abmachungen*)."

§ 10. "Sind Geschäftsbedingungen oder Arten der Preisfestsetzung von Unternehmungen oder von Zusammenschlüssen solcher (*Trusts Interessengemeinschaften* (frequent form of concerns), *Syndikaten, Kartellen, Konventionen und ähnlichen Verbindungen*) geeignet, unter *Ausnutzung einer wirtschaftlichen Machtstellung* die Gesamtwirtschaft oder das Gemeinwohl zu gefährden, so kann das Kartellgericht. . ."

² E.g. KLINGER (member of the Cartel Court), *Die Rechtsprechung des Kartellgerichts*, Berlin, 1930, p. 3.

Similarly KRAUSE, *Die Kartellkündigung*, Mannheim, 1931, p. 5, and many others. Both Klinger and Krause accept that the monopolistic tendency is inherent in every cartel and therefore self-evident.

The essence of *cartels* and *concerns* was construed similarly in the latest draft of the Cartel Law introduced in the Reichstag by the German Socialist Party (Dr. Breitscheid and his colleagues) at the end of 1930, as monopolistic combination. The Bill rightly juxtaposes them with single enterprises so far as they have secured a *monopoly*. To avoid "theoretical" subterfuges in the interpretation of the expression "monopolistic," the draft gives its legal interpretation and states: "Monopolistic within the meaning of this Law are those enterprises and combinations of enterprises which may, owing to their size and nature, exert a substantial influence on the market."¹

In like manner the monopolistic character of cartels, concerns, trusts, etc., is understood also by the German Courts, in particular the Supreme Court (*Reichsgericht*) and the special Cartel Court (*Kartellgericht*). In a large number of decisions it was stated that all combinations of entrepreneurs that exert a substantial influence on the market, this being their essential and *indispensable* mark, fall under the provisions of the Cartel Ordinance of 1923. A *complete* monopoly of the market is not required.² Some regard this as an extensive interpretation of

¹ *Reichsdrucksache No. 439, of December 9, 1930, Antrag eines Kartell- und Monopolgesetzes*, "§ 1 (4). Monopolistisch im Sinne dieses Gesetzes sind diejenigen Unternehmungen und Unternehmungszusammenfassungen, die ihrer Grösse oder Art nach *geeignet sind, einen wesentlichen Einfluss auf den Markt auszuüben.*"

² Decision of the *Reichsgericht* of December 1, 1925, VI, 336/25 (in *Kartell-Rundschau*, 1926, p. 100): "Die unter die Kartell-Verord. fallenden Vereinbarungen setzen eine Verpflichtung über die Handhabung der Erzeugung oder des Absatzes, . . . voraus, *erfordern aber auch, dass mit der Vereinbarung eine Marktbeeinflussung verfolgt wird.*"

Decision of the *Reichsgericht* of March 15, 1927, K 443/26: "Für den Kartellcharakter im Sinne des § 1 Kart.-Verord. ist eine monopolistische Stellung nicht erforderlich, vielmehr *genügt* nach der Auffassung des Kartellgerichts die *Möglichkeit, den Markt in bestimmter Weise wesentlich zu beeinflussen.*" Likewise the decisions of the *Reichsgericht* of July 9, 1926, II, 28/26 (*Kartell-Rundschau*, 1926, p. 466); of June 27, 1929, VI, 679/28 (*Kartell-Rundschau*, 1929,

the Law,¹ which is, however, a mistake; because cartels as well as trusts have only exceptionally a complete monopoly *de facto*, as a rule they exert only a monopolistic (substantial) control of the market, greater or less, and so it is understood by the Law and the practice of the German Courts. The *Reichsgericht* observed that it is immaterial how many enterprises are under the cartel or trust. There can be a trust consisting only of two members, if it is able to exert a substantial influence on the market. Moreover, the smaller the number of members in a given combination the greater the danger that this power will be abused.²

This standpoint was taken up also by the Czech Cartel Bill introduced by the Government in 1931. This Bill includes in the expression "Cartel" all possible combinations of entrepreneurs who retain their independence, though only formally. They are linked together only by the same common purpose "*of influencing the market by a joint action*" whatever its direction be, in particular with the view of influencing production, purchase (of raw materials), sale and marketing, granting of credit, rate of interest on credit, supplies, conditions of sales, delivery, payment, or any other, as well as prices.³

p. 467); of February 7, 1930, II, 247/29 (*Kartell-Rundschau*, 1930, p. 262); decision of the *Kartellgericht* of May 14, 1925, K 310/24 (*Kartell-Rundschau*, 1925, p. 344).

¹ E.g. Professor CARO, *Die Kartellgerichtspraxis und ihre Auswirkungen*, München, 1926, p. 8 et seq.

² Decision of the *Reichsgericht* of February 9, 1926, II, 28/26 (*Kartell-Rundschau*, 1926, p. 466): "... allenfalls könne eine Trustbildung in Frage kommen. . . . Auf die grössere oder kleinere Zahl der Vertragsbeteiligten kommt es nicht an. Auch ein Vertrag zwischen nur zwei gewerblichen Unternehmungen kann den Kartellbegriff der Verordnung erfüllen. Die Gefahr des Missbrauchs wirtschaftlicher Machtstellungen ist gerade dann besonders gross, wenn, sei es infolge weitgehenden Zusammenschlusses oder sonstiger Verhältnisse, die Zahl der in Betracht kommenden Unternehmungen sehr klein ist."

³ *Draft of the Czech Cartel Bill of 1931* (*Kartell-Rundschau*, Berlin, 1932, pp. 14 et seq.).

"§ 1. Die Bestimmungen dieses Gesetzes sind anzuwenden:

"(a) auf jedwelche Vereinigungen der selbständigen Unternehmer die

There is no cartel, concern, trust, or any other combination of entrepreneurs which does not fall under this wide conception of "*cartels*" always provided that such a *union is able to influence the market*, i.e. limits in a certain direction or in some degree the competition that constitutes this market. That is the most essential trait of all those combinations. As an expression of this monopolistic *tendency*, they are treated by the draft equally and jointly.

As a second group co-ordinate with the first group of cartels the Draft mentions single or combined enterprises that, either owing to their size or their nature, are in a position to exert a "*decisive*" influence; this group is directly called "*private monopolies*."¹ Here are referred to monopolies *de facto* more complete than those in the first group. At any rate, both groups, the monopolistic organizations and single enterprises respectively, encounter equal treatment in all provisions of the Bill.

Analogously the majority of writers in the literature of Continental Europe treats American *trusts* and European *concerns*, both vertical and horizontal, as organizations restricting competition still more than cartels and therefore as being all the more monopolistic.

This, however, did not prevent Liefmann from repeating his assertion for years that American trusts of "*to-day*" have no monopolistic character, and European trusts, i.e. concerns that distinguish themselves by the fact that they neither were nor are monopolistic; wherein they differ *essentially* and *solely* den Zweck verfolgen, durch einheitlichen Vorgang auf den Markt zu wirken, insbesondere auf die Erzeugung, auf den Ankauf, auf den Verkauf und Absatz, auf die Gewährung von Krediten und auf die Höhe der Zinsen des Kredites, auf die Lieferungen jedweder Art, auf die Verkaufs-, Lieferungs-, Zahlungs- und andere Geschäftsbedingungen und auf die Preise (Kartelle)."

¹ Ut sup.: "§ 1 (b) . . . auf solche *Einzelunternehmungen* oder *vereinigte Unternehmungen*, die zufolge ihres Ausmasses oder ihres Wesens imstande sind, einen *entscheidenden Einfluss* auf den Markt auszuüben (Privatmonopole)."

from trusts. Still worse, the outlook is not very comforting as more and more writers on the Continent repeat the same improbable stories about trusts,¹ and especially about European concerns.² No wonder that chaos and gross inconsistencies are spreading with elemental power in the German books on concerns themselves. Yet all their definitions are different, although all concerns, being symptoms of the *same* economic phenomenon, are essentially alike.

The question of concerns appears to be similarly confused in the Italian literature; the confusion was first caused by Professor PANTALEONI. As the arguments here are different from those advanced by German writers I have to review them briefly now. In a circumstantial controversy with MENZEL'S *Kartelle und Die Rechtsordnung* (Leipzig, 1902),

¹ E.g. BAUER (*Die rechtliche Struktur der "Trusts,"* Mannheim, 1927) maintains that trusts are non-monopolistic organizations and show no monopolistic tendencies (cf. p. 52 ante). Owing to some very "gross misunderstandings" he appeals to COOK (*Trusts*, New York, 1888), who proves the direct opposite (cf. p. 67, ante, and quotation in note 2 on page 67).

² E.g. WIEDENFELD, *Kartelle und Konzerne*, Berlin, 1927, pp. 1 et seq. According to him, whereas cartels aim at a control of the market, concerns aim only at "independence" from the market. Wiedenfeld believes that an enterprise "independent" from the market may exist which would not at least partially control this market. To some extent also MÜLLENSIEFEN, *Kartelle als Produktionsförderer*, Berlin, 1926, p. 11: "*Konzentration zum Zwecke der Marktunabhängigkeit.*" DUSCHNITZKY, *Das Konzernproblem*, Kaunas, 1927, p. 28; conformably with Liefmann he calls concerns "*the highest non-monopolistic form of organization.*" "*Konzern ist die komplizierteste und höchste nicht monopolistische Organisationsform, der die Möglichkeit und Tendenz zur fast unbeschränkten Ausdehnung eigen ist, die mehr oder weniger vollständig sämtliche Formen des wirtschaftlichen (in specie industriellen, etc.) Zusammenschlusses in sich begreift und einer einheitlichen organisatorischen Leitung unterworfen ist.*" An original idea indeed. Concern, although it includes "all" forms of industrial combinations, has a tendency and the opportunity of an "*almost unlimited expansion,*" but is not monopolistic! Similarly many other writers, and recently VANONI, *Zur Begriffsbestimmung der Kartelle und Konzerne*, Heidelberg, 1931, pp. 65 et seq.

Pantaleoni attacks the view that every cartel (*sindicato*) is a *monopoly sui generis*, i.e. a "qualified" monopoly. He says there that only the "old" cartel (*sindicati antichi*) had a monopoly formed by *competitive* enterprises with a view to restricting mutual competition. "Modern" cartels (*sindicati moderni*) are formed by enterprises that are mutually complementary and do not compete with one another. With the modern division of labour every merchandise is the product of a long chain of a hundred and even a thousand (Pantaleoni likes to indulge in a little exaggeration) independent enterprises, each of them producing one link in this chain.

All these enterprises are together one large "economic complex" and these enterprises form the modern syndicates.¹

Therefore, Pantaleoni concludes, modern syndicates do not aim at monopolies, they do not exert a monopolistic influence on prices, and in general they never arise under conditions suitable to monopolies. It is a "legislative" error impairing the economic development of the country to treat these syndicates as monopolies.²

First of all Pantaleoni does see that *horizontal* cartels are not at all "antique"; quite the contrary, they are still as "up to date"³ as they were formerly; they have now a *universal*

¹ PANTALEONI, "Alcune osservazioni sui sindacati e sulle leghe. A proposito di una memoria del Prof. Menzel," in *Giornale degli Economisti*, Rome, 1903, pp. 236 et seq., 346 et seq., and 560 et seq. On p. 238 et seq. we read: ". . . In primo luogo, si tratta di sindacati fatti, non già tra industrie concorrenti . . . ma tra industrie di cui i rapporti vicendevoli sono quelli di complementarità e di strumentalità, e che costituiscono un sistema, cioè dei complessi."

² PANTALEONI, ut sup., pp. 238 et seq.: "Poichè, a mio avviso, nè il sindacato, nè la lega, al giorno d'oggi vogliono costituire monopoli, non riescono a creare monopoli, non nascono da condizioni propizie alla formazione di monopoli, non influiscono sui prezzi a modo di monopoli. E un errore legislativo trattarli come tali, errore che porta a conseguenze dannose per lo sviluppo economico di un paese."

³ VITO (*I sindacati industriali*, Milano, 1930, pp. 31 et seq.) is the first Italian writer who pointed out that there is no justification in view of this fact to use the expression: "*sindicati antichi*."

application (*Italy* not excepted) and are the basis for a further *vertical* extension of industrial combines. Pantaleoni is not aware of the fact that as a rule cartels in a *pure vertical* form do not exist, which I have already shown above. Every vertical cartel is at least to some extent horizontal. I should like to mention once more that we are dealing here with combinations that regulate production of *whole branches* of industry, and not with calculations of separate enterprises to produce more cheaply. Thus, for instance, a boot factory that brings under its management or acquires the property of a leather factory with the view of producing at a lower cost does not interest us here, even if the united works would call themselves "concerns"; such cases often occur. This kind of concern does not come within our subject-matter, unfortunately not all writers bear this difference in mind.

Further, Pantaleoni seems not to see that vertical combinations, though uniting non-competitive enterprises, also restrict competition *indirectly*, as they monopolize for their exclusive use the sources of raw materials or semi-manufactured products. In that way they are obstructing the competition of their rivals who are cut off from those sources or are compelled to buy the raw material at a higher price. The formation of new rival enterprises is also rendered more difficult or often utterly impossible. Frequently in cases of increased demand for raw material a direct competition in the price is carried on between the buyers and suppliers. Hence the tendency of vertical cartels to a permanent control of the supply of the raw material. This control of the enterprises that participate in vertical combinations would not be so much talked of if it were not for fear of competition and the need to anticipate it by means of such a control. Consequently there is not the least doubt that the vertical organization aims, like the horizontal one, though in a somewhat different manner, at a restriction of competition, i.e. at a monopolization of the market. These organizations are, therefore, not opposites but mutual comple-

ments in the striving after the same end. Some writers have already long ago¹ drawn attention to this fact, which was also stressed by the report of the British Committee on Trusts in 1919.²

Later in the course of his work Pantaleoni contradicts himself, admitting that modern syndicates often go together with old ones (*"antichi"*); this view he illustrates by the

¹ WILLIAMS, *Capitalist Combination in the Coal Industry*, London, 1924, p. 14: "The modern tendency towards combination of capital takes two main forms—the horizontal combine and the vertical combine." P. 15: "The urge towards vertical combination is generally provided by the need to control the services of raw material, for, during a period of rising demand, those who control the supplies of raw material can hold to ransom those firms engaged in the manufacturing process. Under such circumstances it is certainly to the advantage of the final producers to gain control of the sources and supplies of the materials they need."

P. 13: "Everywhere these combinations spring substantially from the same cause—competition."

SAITZEW, *Horizontal und Vertical im Wandel der letzten Jahrzehnte*, Jena, 1927, p. 36: "Horizontal und Vertical nicht in Antithese, sondern in Synthese. . . ." See also p. 10. RUNDSTEIN, ut sup., pp. 1 et seq.; ZEUTHEN, *Problems of Monopoly and Economic Warfare*, London, 1930, pp. 149 et seq.; FRIEDLÄNDER, *Konzernrecht*, Mannheim, 1927, pp. 335 et seq.: "Konzerne und Kartelle sind nicht Antipoden in dem Sinne, dass die eine Organisationsform die andere ausschliesst. Von jeher haben sie nebeneinander bestanden. . . . Zwischen Konzernbildung und Kartellen bestehen von jeher enge Wechselbeziehungen, die sich auch rechtlich nach den verschiedenen Richtungen auswirken. Das Nebeneinander ist zugleich ein Miteinander." MAZEAUD, *Le problème des unions de producteurs*, Paris, 1924, pp. 79 et seq.; DERNIS, *La concentration industrielle en Allemagne*, Paris, 1929, pp. 191 et seq., mentions as one of the main purposes of German concerns: "De supprimer toute concurrence inutile."

² Report of Committee on Trusts, ut sup., p. 21. HILTON's Study in Section IV, "The Achievements of Combinations," as one of those purposes is given: "Monopoly of Material." "The control of raw materials by an association promoted specially for the purpose may, and doubtless would, be so constituted as not to shut the door on aspirants to the industry, but where the control is exercised by a powerful consolidation and covers a large proportion of the available supplies it increases the difficulty of independent capital and enterprise entering the industry."

examples of two then modern cartels in Austria. None the less, he continues to uphold his unreal theory and cannot understand that there are not two separate syndicates, but only one organic whole blending both forms and, consequently, monopolistic even according to his own estimation (Pantaleoni acknowledges the monopoly character of "old" syndicates).¹

He betrays further inconsistency when calling in evidence COSSA² and JEANS,³ although they do not support his theory. Neither one nor the other divides syndicates or trusts into horizontal or vertical ones. Contrary to Pantaleoni, they treat all of them as one kind and maintain, in defiance of the monopolistic theory, that they need not have monopolies. Therein they differ (as to horizontal cartels) from Pantaleoni. Both, however, admit that cartels as well as trusts restrict competition;⁴ Jeans even says that: "While the syndicates or trusts that have been established in our own and other countries have not necessarily been monopolies, it is obvious that their objects were likely to be the more successful according as they got the whole or only a part of the business syndicated into their own hands, and if the whole of the business in question was under their control, the organization became a virtual monopoly in the country of its origin."⁵ Thus, after all, neither differ greatly in principle from the current monopolistic theory; the difference springs rather from a misunderstanding of the word "monopoly."

But Pantaleoni was not aware of all these defects of his theory, and was so deeply convinced of its correctness that in

¹ PANTALEONI, *ut sup.*, pp. 240 et seq.

² COSSA, *I sindacati industriali*, Milano, 1901.

³ JEANS, *Trusts, Pools, and Concerns*, London, 1894.

⁴ COSSA, *ut sup.*, p. 12: ". . . non costituiscono di necessità un monopolio, ma sono semplicemente istituiti i quali alla concorrenza di taluni imprenditori sul mercato sostituiscono quella del loro gruppo."

⁵ JEANS, *ut sup.*, pp. 21 et seq.

later years he reprinted it twice without alteration.¹ Each time he complained that "half the world" held the opposite belief and maintained that "certainly it is no exaggeration" to say that those "who consider the syndicate a monopoly must, indeed, be obsessed by the evil spirit."²

That he found so many followers among the Italian economists is due to Pantaleoni's great authority; and now more than "half the world," in any case so far as Italian writers are concerned, supports his theory.³ However, a few of them

¹ *Scritti vari di economia* (Serie seconda), 1909; *Erotemi di economia*, Bari, 1925, Vol. II, pp. 252 et seq.

² PANTALEONI, ut sup., p. 238: ". . . *E certo non esagero dicendo che sia una vera ossessione quella dei giuristi di voler vedere un monopolio (scil. a qualified one, a more or less complete one) ovunque incontrano un sindacato.*" But he inaccurately omits the economists, of whom many, perhaps even a greater number than lawyers, are in favour of the monopolistic theory.

³ E.g. GRAZIANI, *Istituzioni di economia politica*, Torino, 1904, pp. 290 et seq. His main argument is—that there is a possibility of forming a new competitive enterprise, even if the syndicate embraced all enterprises in a certain branch of industry. ("*Anche se il sindacato abbraccia tutte le imprese esistenti nulla vieta che sorga un' impresa nuova,*" p. 291.) He writes as if he did not know the arguments of the monopolistic theory. The same he repeats unaltered in the later edition of 1925.

ARIAS (*Principi di economia commerciale*, Milano, 1917, pp. 258 et seq.) repeats the arguments of Pantaleoni and emphasizes even more strongly than the latter that modern syndicates not only march hand-in-hand with the old monopolistic ones, but, moreover, are mixed and interwoven with them (p. 262). "*Già fu osservato dal Pantaleoni che il sindacato complesso e il sindacato monopolistico si ritrovano tal volta l'uno 'a lato' dell'altro, o meglio direbbesi, l'uno frammisto all' altro.*" Nevertheless he persists in his theory.

BARONE (*Principi di economia politica*, Roma, 1920, 5th ed., pp. 183 et seq.) goes much farther than Pantaleoni, and, similarly to Grunzel, extends the monopolistic theory to horizontal syndicates. Thus he says pompously: "*We negative any likeness between syndicates and monopolies. A syndicate cannot create monopolistic prices, if there are no natural or legal conditions for the formation of monopoly.*" ("*Neghiamo qualsiasi rassomiglianza tra un sindacato ed un monopolio. Un sindacato, in generale, non può far prezzi di monopolio se non esistono già le condizioni naturali o legali per la costituzione di un*

were not misled and retained the correct view on this problem, among them Vilfredo PARETO, one of the most eminent economists Italy ever produced, also an able sociologist and the author of the excellent *Sociologia Generale*. It is clear to Pareto that all cartels, syndicates, and trusts, whether old or

monopolio.”) He repeats this almost incredible assertion, of course with the old arguments, for years in the several editions of his book, and most of the Italian writers agree with him.

Recently VITO defends the theory of Pantaleoni in his *I sindacati industriali*, Milano, 1930, pp. 31 et seq. (similarly in the second edition, 1932). Vito incorrectly reproaches Pantaleoni with not having understood Menzel. He says that Pantaleoni unnecessarily entered into polemics with the latter, as Menzel, in accordance with all German writers, holds the same view with regard to vertical syndicates. When speaking on “*cartels*” at the General Meeting of the Verein f. Sozialpolitik in 1894 Menzel had in mind *only* the old (“*antichi*”) syndicates formed between competitors (repeated later in his book in 1902). Indeed, it would be a curious congress of economists and prelectors that considers only *old* forms of a certain economic phenomenon, *ignoring its present forms*. Fortunately, it was not as bad as all that. Menzel, when speaking at this conference on “*cartels*,” expressly stated that he understood thereby the whole cartel movement as one uninterrupted economic phenomenon which in Austria and Germany is given the name “cartel” (*Schriften d. Ver. f. Sozialpolitik*, Leipzig, 1895, Vol. 61, p. 24). Similarly the other two prelectors at this conference, Professor STIEDA (ut sup., pp. 2 sqq.) and Professor BÜCHER (ut sup., pp. 138 sqq.), as well as the chairman, Professor SCHMOLLER (ut sup., pp. 234 sqq.). They all took the view that the *whole* cartel movement and all cartels represent a kind of *monopolies de facto* and should therefore be placed under public control. Schmoller stated this in his concluding speech (pp. 234 et seq.). Thus Pantaleoni understood Menzel perfectly, but did not comprehend that the latter was right.

Owing to some misunderstanding, Vito declares also that Professor LANDESBERGER voiced the same view at the 26th Congress of German Lawyers in 1902 which in the following year Pantaleoni introduced into the Italian literature. Landesberger only warned against the confusion of cartels with what occurs when a business in the iron trade unites with a coal enterprise and a transport firm, etc., this being only an instance of lowering cost of production *within this one enterprise* (“*Gesamtunternehmen*,” not “*Unternehmenszusammenschlüsse*”!). I have also drawn attention to this above. But with regard to vertical cartels or syndicates, Landesberger occupies the

new, constitute one and the same economic phenomenon, the core of which is the complete or partial suppression of competition in order that combined enterprises may make the largest possible profits at the minimum cost of production.¹

directly *opposite* standpoint and expressly demands that "*concerns*" or "*groups*" ("*Gruppe*," a term accepted by Vito for his non-monopolistic syndicates), i.e. when two or more *co-ordinate* enterprises (mutually competitive ones) are controlled by a third non-competitive enterprise, often a *bank*, should be treated *equally* with cartels and brought under one common cartel law, since they restrict competition even more strongly than single horizontal cartels (*Verhandlungen des 26. Deutschen Juristentages*, Berlin, 1902, II, pp. 298 et seq., 301-303). For that reason Landesberger describes "*Concern*" ("*Gruppe*") as "looser forms" prior to trusts, which he considers as the highest form of monopolistic organization ("*der lockere Verband vor der Trustbildung wird als 'Concerns' bezeichnet*," p. 301). In accordance with Landesberger, the second Prelector at the Congress, Professor WAENTIG, treated *all* cartels and trusts equally as a symptom of the same monopolistic tendencies (ut sup., I, pp. 63 et seq.).

The false definition of "*concerns*" as non-monopolistic unions different from cartels is of later date, and, as I have shown above, it is the minority view in German literature, using quite different arguments. One cannot, therefore, impute to the whole German science that it coincides with the theory propagated by Professor Pantaleoni, as Vito does.

¹ PARETO, *Manuel d'économie politique*, Paris, 1927, 12th ed., p. 462. "*Les Trusts: Les syndicats modernes ou deux buts principaux, à savoir: 1° Donner aux entreprises la grandeur qui correspond au coût de production minimum. . . . M. PANTALEONI ajoute qu'ils ont aussi pour but de réunir ensemble des entreprises connexes et d'en faire un tout économique. Il est bien certain que cela est quelquefois vrai, mais c'est là, pour le moment du moins, un but très secondaire à côté de celui dont il nous reste à parler. 2° Se soustraire en tout ou en partie à la libre concurrence.*"

Similarly Professor LORIA, *Corso di economia politica*, Torino, 1927, 3rd ed., pp. 562 et seq. He treats all combinations of enterprises, whether cartels, syndicates, or trusts, jointly ("*coalizioni industriali*") as an expression of the same monopolistic tendencies against the principle of free competition. Another Italian, Professor DE SANCTIS, *Das Recht der Kartelle und anderen Unternehmenszusammenfassungen in Italien*, Berlin, 1928 (this work was published only in German), p. 2, rightly points out that even strictly *vertical* cartels indirectly restrict competition; he therefore places them on the same

Finally, there is another theory, especially repeated by some French and Italian writers; it distinguishes *defensive* cartels that protect industry against crises ("*syndicats de défense industrielle et commerciale*," "*sindacati di difesa industriale e commerciale*") from *aggressive* ones that attack competitors or consumers ("*syndicats de coalition, d'accaparement*," "*sindacati di accaparramento e di monopolio*"), and ascribes the monopolistic characteristics only to the latter.¹ It is sufficient to recall here that BABLED himself, who was the first to come forward with his theory in modern cartel literature,² stated that both kinds of syndicates, defensive as well as aggressive, make use of the same forms of organization and apply the same procedure, differing only in their purposes.³ That is to say, both restrict competition and monopolize the market: the monopolistic characteristics are not a point of difference, but common ground. At the moment we are concerned only with this common and essential trait of monopoly. Whether such is of an aggressive or defensive nature is a more remote question,

plane with horizontal cartels. Among earlier writers is to be mentioned CASSOLA, *I sindacati industriali (Cartelli, Pools, Trusts)*, Bari, 1905, pp. 116 et seq. He considers *all* unions of entrepreneurs as monopolies to some extent: "*Figure diverse del fenomeno monopolistico*," . . . "*sindacati nella loro generalistà costituiscono monopolii parziali*." FLORA, *I sindacati industriali*, Torino, 1900, p. 12.

¹ BABLED, *Les syndicats de producteurs* . . ., Paris, 1892, pp. 16 et seq. and 44 et seq.; MARGHERI, "*Sindacati di difesa industriale*," in *La Riforma Sociale*, Roma, 1898, pp. 305 et seq., and many others. Similarly in the German literature: MENZEL, in *Schriften d. Ver. f. Sozialpolitik*, ut sup., vol. 61, p. 25, distinguishes between "*Schutzkartelle*" and "*die eigentlichen Monopolisierungskartelle*," but consistently does not deny the monopolistic character of the first.

² I shall have occasion later (pp. 208 sqq.) to show that industrial combinations were divided in the same way by MALYNES in the English literature at the beginning of the seventeenth century.

³ BABLED, ut sup., p. 44: ". . . il en est d'autres, qui ont quitté ce rôle purement défensif pour prendre un rôle d'agression plus ou moins déguisée soit contre leurs concurrents, soit contre les consommateurs. Syndicats de défense et syndicats d'attaque *usent des mêmes formes, ont recours aux mêmes procédés.*"

dependent upon varying circumstances which may cause the *very same* cartels and trusts to serve one purpose to-day and a different one to-morrow. Actual observation of events corroborates this at all times and in all places. Hence this factor must not be taken into account when defining the *essence* of this phenomenon.

I am deeply convinced that not one in a hundred of the various theories questioning the monopolistic character of some or even all combinations of entrepreneurs that regulate production or sale would exist had their study not been confined to their *present* forms and had they not been treated as a German, American, or other specific, and if in the first place the *history* of those combinations had been considered. For history shows with classical clearness that analogous unions of producers and merchants regulating production and sale were known not only previous to 1873, but for whole ages before Christ, and, as a negation of the principle of free competition, were *always* monopolistic. History further proves that exactly the same monopolistic movement which to-day is expressed in cartels and trusts, in the widest signification of the term, recurs under various shapes in all known markets of the world. Wherever competition arose, there appeared its inseparable companion—the monopoly movement. The Phœnician merchant was its first pioneer known to us.

The more complicated economic life became and the speedier and more highly it developed technically, the more grew the monopoly movement, assuming more complex forms. But its essence remained *the same*, for the essential content of economic life is invariably the same: the eternal struggle for a better existence. It is merely the *technique* of life that changes, at periods with great rapidity, in recent times under our eyes. Thus, for instance, the *air navigation law* as an expression of this technique is really new; but the cartel or trust law has always regulated the same struggle for existence, and therefore

it is as old as this struggle. The present anti-cartel or anti-trust provisions do not differ substantially from those which we find in the old Indian codes some centuries before our era or later in the Roman law; it was merely the *formal* side of these enactments that had changed correspondingly with the changing forms of organization of this monopoly movement and the changing administration of economic social life. Here and there, similarly as to-day, a change took place in the attitude of the State, but always towards *the same* economic phenomenon.

To demonstrate this is the object of this work which for the first time considers the entire monopoly movement in outline in the light of its historical development from the earliest times until the beginnings of its latest phase through which we are now passing. Perhaps it will help to rectify some opinions on present cartels and trusts.

CARTELS AND TRUSTS

CHAPTER I

Economic monopolies in Phoenicia and other countries of Antiquity.—Anti-cartel regulations in the early legal monuments of India.—Conditions in Greece.—Aristotle's theory

SOME thousand years before Christ the institution of monopolies was already known in commercial dealings of the Phoenicians, the first merchants recorded in history.¹ There existed, as Professor Movers proved, in this first cradle of trade many monopolies, particularly the corn monopoly, the exclusive manufacture and sale of Tyrian dye, the monopoly of the extraction and sale of precious metals, and other rights reserved for the kings and their nobles.² The towns of Phoenicia, in particular Carthage, maintained during whole centuries their monopolistic position owing to the cartel contracts with the neighbours protecting their markets against Greek competition. These agreements had at the same time excluded competition between the contracting parties themselves by strict division of the markets, exactly as is done by the district cartels to-day.³

¹ MOVERS, *Das phönizische Altertum*, Berlin, 1856, Vol. II, Pt. III, 1, pp. 107 et seq.

² MOVERS, ut sup., p. 108: "*Die Fabrikation und der Verkauf des tyrischen Purpurs wird schon in alter Zeit Monopol der Könige gewesen sein. Von den Königen gehen nach biblischen Nachrichten die Handelsreisen in ferne Gegenden aus. Den König von Tyrus stellt der Prophet Ezechiel als klugen Handelsfürsten hin, der die edelen Metalle in ihren verborgenen Sitzen erspäht, sich durch deren Erwerbung bereichert und solche Reichthümer durch seinen Handel noch vermehrt. Auf eine Betheiligung der tyrischen Aristokratie am Handel deutet auch wohl Jesaja hin.*" In the notes on pp. 107 et seq., Movers cites the ancient sources from which his information is drawn.

³ SCHMOLLER, *Allgemeine Volkswirtschaftslehre*, Leipzig, 1904, Vol. II, p. 567.

The system of monopolies pertaining to the sovereign and the aristocracy spread from the Phoenicians to other countries, in the first instance to those with whom the Phoenicians had close trade relations. Thus from the earliest times monopolies were applied to whole branches of trade in the *Jewish*, *Arabian*, and *Egyptian* countries. Jewish Kings reserved for themselves the balm and date trades.¹ King SOLOMON secured monopolies of a number of goods; he had his own merchants who transferred their total profits into the royal treasury, for which they received daily remunerations.² Similarly Arabian kings monopolized the trade of imported ointments.

Along with these state monopolies, belonging either to the sovereign or to certain private persons to whom he granted such privileges, we can trace in the commerce and trade of the oldest countries distinct private monopolistic tendencies. Governments were continually engaged in efforts to combat the exorbitant prices created by monopoly organizations, by means of severe punishments and price control. In the papyri are extant proofs that private monopolies existed among manufacturers of wool and cloth in ancient *Egypt*.³ As far back as 3000 years B.C. schedules of merchandise were known, with fixed rates, directed against free trade prices. We meet with a similar example in old *Babylon*,⁴

¹ MOVERS, *ut sup.*, Vol. II, Pt. III, i, pp. 108 et seq.

² EWALD, *Geschichte des Volkes Israel bis Christus*, Göttingen, 1843, Vol. III, Pt. I, pp. 73 et seq. Particularly on p. 75 he states: "*So liess er [i.e. King SOLÔMO, 1025-986 B.C.] den Handel durch seine eigenen Kaufleute betreiben, welche ihm den eigentlichen Gewinn gegen einen Tageslohn abgeben mussten.*" This monopoly applied only to some merchandise, such as Egyptian weapons, and other.

³ KOHLER, *Jahrbücher für Dogmatik*, Vol. XVIII, pp. 460 et seq., and also *Der unlautere Wettbewerb*, Berlin, 1914, p. 2.

⁴ SCHNEIDER, *Die Anfänge der Kulturwirtschaft. Die Sumerische Telpelwirtschaft*, Essen, 1920, pp. 70 et seq.: ". . . Es müssen Tempelpreise und Preise des freien Verkaufes auseinandergehalten werden." Distinct traces that schedules of merchandise were in use in the Balylonian state we find in the famous *Hammurabi Code*, PERCY HANDCOCK, *The Code of Hammurabi*, London, 1920, p. 16,

and as regards the Far East, in China in the eleventh century B.C.¹

Likewise in the old monuments of *India*, a few centuries B.C., we find regulations prohibiting artisans and merchants, under penalty of heavy fines, from making *collective agreements to influence the natural market prices of goods by withholding them from trade*, or in any other way. Amongst other punishable offences are mentioned the prevention of other people from buying or selling freely. This is the classical prototype of *boycott*, applied nowadays by cartels to outsiders. Artisans and merchants contravening these rules were sinners and criminals according to Indian law, which provided heavy fines against them.²

§ 51: "If he have not the money to return, he shall give to the merchant (grain or) sesame, at their market value *according to the scale fixed by the king*." Cf. also the work of Professor Müller, *Die Gesetze Hammurabis und ihr Verhältnis zur mosaischen Gesetzgebung sowie zu den XII Tafeln*, Wien, 1903, pp. 22 et seq., and 97; idem, Professor BONFANTE PIETRO, *Le leggi di Hammurabi re di Babilonia*, Milano, 1903, p. 11. It is very likely that the Code of Hammurabi contained some rules dealing directly with trade monopolies in that part which could not be deciphered; owing to the effacement of five columns on the stone slab containing the code, §§ 66 to 99 are missing. It is apparent from the precepts immediately preceding and following this space that it must have regulated some matters in the province of Mercantile Law.

¹ SCHIELE, *Wirkung der Höchstpreise*, Jena, 1916, p. 15.

² J. MEYER, *Das altindische Buch vom Welt- und Staatsleben. Das "Arthaśāstra" des "Kautilya"*, Leipzig, 1926, pp. 323 and 815 seq. This rule reads in Meyer's translation as follows: "Wenn Leute sich zusammentun und eine Verschlechterung der Beschaffenheit der Leistungen der Grobhandwerker und Kunsthandwerker, den Gewinn oder eine Störung des Verkaufes und des Kaufes (die Verhinderung anderer am Kauf und Verkauf) verfügen, ist die Strafe 1000 pana. Oder wenn die Händler sich zusammentun und eine Ware zurückhalten oder sie um ungehörigen Preis verkaufen oder kaufen, ist die Strafe 1000 pana." See also J. MEYER, *Über das Wesen der altindischen Rechtsschriften und ihr Verhältnis zueinander und zu "Kautilya"*, Leipzig, 1927, p. 185, where an analogous quotation from the later book of the *Yājñavalkya* is given, which in this particular case was distinctly modelled on the rule of the book *Kautilya*: "Wenn Grob-

The observance of such regulations was supervised by permanent market superintendents specially instituted for this purpose, to whom also was entrusted the general supervision of tradesmen.¹ Amongst other things, they had to see that merchants kept to the fixed prices. The profit of merchants was also determined in advance; this averaged 10 per cent. of the fixed value of the goods. Fines were inflicted for any wilful increase, gradually rising to meet repetitions of the offence.²

These unions of ancient India, which so distinctly resemble cartels, were called rings by Meyer. Although he does not explain why this term is used, it may be excused in the case of a historian, as is Professor Meyer, by the fact that not only in history, but also in economics, all old cartels are commonly called rings; moreover, the most typical cartels of old repeatedly applied the name ring to themselves, so recently as the last century.³ This gives, however, no ground for absolutely contraposing the modern cartels against the old rings as quite different institutions; but it is often met with in the modern science of cartels, although the substance and ultimate purpose of almost all ancient rings and the cartels of to-day are identical. In the course of centuries, merely the form of organization of the same economic phenomenon changed.

oder Feinhandwerker sich zusammentun und drückende Preise (i.e. of their products) durchsetzen, oder wenn sie absichtlich der Wert (i.e. the quality of their products) verringern oder steigern, dann die höchste *Sāhasa*-busse (the highest pecuniary punishment).

“Wenn Kaufleute sich zusammentun und Ware mittels eines ungehörigen Preises am natürlichen Verkauf verhindern oder um ungehörigen Preis verkaufen, so ist die Strafe die höchste Sāha-busse.”

¹ J. MEYER, ut sup., p. 321.

² J. MEYER, ut sup., p. 324.

³ To convince oneself it is sufficient to look through any of the year-books of the German periodical *Industrie*, which also deals with the cartel movement in trade and commerce. Since 1903 it has been replaced by the *Kartell-Rundschau*.

We learn of the exercise of monopolies in ancient *Greece*, both by private enterprise and the State, from the writings of Aristotle in the first instance,¹ and then from other sources which have been compiled by Professor Edward Meyer, the renowned investigator of the economic life of antiquity.²

Aristotle, when analysing the origin and substance of the monopoly *de facto*, gives two concrete instances of the creation of such a monopoly. In the first instance, a Banker of Syracuse in Sicily bought up with money deposited with him all the iron from the iron mines in the island. Becoming thereby the only seller of Sicilian iron, and free from all competition, he was able to dictate the market price at pleasure. Without increasing the price much as compared with that under free competition of the iron producers, he made a considerable net profit of 100 talents to every 50 laid out. But Greek Law, like all legislations at that time, was combating private monopolies, so he was banished, and his activities were stopped.³

In the other instance of a monopoly *de facto*, Aristotle refers to an interesting trade speculation of the sage THALES OF MILETUS. Thales was made fun of because his profession as a philosopher yielded no pecuniary advantage, and could not remedy his poverty. Upon this Thales devised—according to Aristotle—a certain financial artifice to prove the tangible value of his knowledge. Having ascertained through his astronomical knowledge and observations that the olive crop would be unusually rich in a certain year, while it was yet winter, long before the harvest, he hired all the olive presses in Miletus and Chios, which, there being so very little competition at that season of the year, he was able to do with even the scant funds at his disposal. When the harvest came

¹ ARISTOTLE, *Politeia Athenaiou*, LI, 4; *Politikon*, L, c. IV, 5-8; and also *Oekonomika*, II, c. II, 36.

² MEYER, *Die wirtschaftliche Entwicklung des Altertums*, Jena, 1895, p. 39, and the sources and literature quoted there.

³ ARISTOTLE, *Politikon*, I, c. IV, 7-8.

and the crop, as foreseen by him, proved to be really plenteous, there suddenly arose a demand for olive presses, but they were concentrated in the hands of the philosopher. With no competition, he let them at a good rate, making a considerable amount of money and proving that *a philosopher, when he likes, can easily become rich—but his "ambition is of another sort."*¹

Although both cases, and particularly the latter, concerning the philosopher Thales, were ill-chosen examples of a monopoly of fact inasmuch as they were not taken from the sphere of producers or merchants, who, as stated by Aristotle, often applied monopolies in order to increase their income, the conclusions at which he arrives with regard to the essential properties of a monopoly *de facto* are sound.

For us it is of importance that the instances quoted were not isolated cases, but an expression of a principle generally applied in trade of that time.² This is also confirmed from other sources as regards conditions prevailing in the corn trade, which branch of trade was in Greece and other countries under strict state control. Special permanent corn superintendents kept watch as in old India that nobody should buy up corn in order to raise its price. In spite of such precautions, and the provision of the death penalty for offenders, speculative purchase flourished in Athens, the chief corn market of Greece. Corn merchants continually endeavoured to concentrate the largest possible stock of corn in their hands so that they might increase its price on the market. Analogous conditions prevailed in Syracuse, the second in size to Athens as a trade centre of ancient Greece.³

Aristotle sees the cause of these conditions in the fact that the mercantile vocation, ever since its origin and the appearance

¹ ARISTOTLE, *ut sup.*, I, c. IV, 5-6.

² ARISTOTLE, *ut sup.*, I, c. IV, 6.

³ MEYER, *ut sup.*, pp. 39 et seq. See also the 22nd speech of Lysias against corn traders buying up corn and monopolizing the market. This confirms the universality of the practice on the Greek markets of the time.

of money and trade, has been constantly trying to attain the highest possible profits. In the course of time, trade routine and ingenuity in obtaining goods most cheaply and selling them most profitably developed.¹ This art of commercial speculation, aimed at the highest earnings, has, according to Aristotle, brought about monopolies, which became part and parcel of the art of making money. Therein consisted also the monopolized position acquired by the Banker of Syracuse and the philosopher Thales of Miletus.

Aristotle further states that many countries employed this art as a subsidiary source to cover their expenses, and made the sale of certain commodities a monopoly. Some statesmen have based their policy merely on monopolies, but this should not surprise one, as States are as much in want of money as households, or even more so, and to understand such operations is an advantage for statesmen.²

When writing about monopolies brought into operation by the State, Aristotle had in mind not only legal monopolies of the State, but also, and perhaps in particular, private monopolies *de facto*, as assumed by private monopolists. This comes of the fact that he deals with monopolies jointly, making no distinction between them whether owned by private individuals or by the State, as well as the way in which he presents monopolies organized by the State, emphasizing that States-

¹ ARISTOTLE, *ut sup.*, I, c. III, 15: “. . . πορισθέντος οὖν ἤδη νομίσματος ἐκ τῆς ἀναγκαίας ἀλλαγῆς θάτερον εἶδος τῆς χρηματιστικῆς ἐγένετο, τὸ καπηλικόν, το μὲν πρῶτον ἀπλῶς ἴσως γινόμενον, εἶτα δι’ ἤδη τεχνικώτερον, πόθεν καὶ πῶς μεταβαλλόμενον πλείστον

² ARISTOTLE, *ut sup.*, I, c. IV, 6: “ἔστι δ’, ὥσπερ εἵπομεν, καθόλου τὸ τοιοῦτον χρημαστικόν. ἐάν τις δύνηται μονοπωλίαν αὐτῷ κατασκευάζειν. διὸ καὶ τῶν πόλεων ἔναι τοῦτον ποιοῦνται τὸν πόρον, ὅταν ἀπορῶσι χρημάτων· μονοπωλίαν γὰρ τῶν ὄντων ποιοῦσιν.”

C. IV, 9, in fine: “τὸ μὲντοι δράμα θάλαω καὶ τοῦτο ταῦτον ἐστὶν ἀμφότεροι γὰρ ἐαυτοῖς ἐτέχνασαν γενέσθαι μονοπωλίαν· χρησίμον δὲ γνωρίζειν ταῦτα καὶ τοῖς πολιτικοῖς. πολλάις γὰρ πόλεσι δεῖ χρηματισμοῦ καὶ τοιούτων πόρων, ὥσπερ οἰκία, μᾶλλον δέ. διόπερ καὶ πολιτεύονται τῶν πολιτευομένων ταῦτα μόνον.”

men ought to know how to organize such. This would be quite irrelevant if it were a monopoly of public law based on a legislative act, or were a prerogative of the sovereign.

The fact that not only private persons, but also States, made use of monopolies *de facto* in those days to augment their incomes, is stated by Aristotle in his *Oekonomica* when he describes the precepts of Pytocles the Athenian. According to the latter, the State had to buy up from private persons the whole stock of lead at market prices, and afterwards sell it at three times the price.¹ This financial operation corresponds to that which gave to the Banker of Sicily the exclusive iron monopoly.

The above-represented arguments of Aristotle have been taken into account once before in the cartel literature. Thus the history of the monopoly of THALES, as related by Aristotle, is discussed by Professor HIRST in his *Monopolies, Trusts and Kartells*. He identifies this monopoly, together with old monopolies on the whole, with the present trusts and cartels. They are linked by the same main and essential object; to augment profits by eliminating competition and increasing prices. The same economic phenomenon is only given diverse names. The fact that present monopolies are the product of great modern enterprises Hirst rightly considers as non-essential.² Unfortunately, he compressed his pertinent remarks

¹ ARISTOTLE, *Oekonomica*, II, c. II, 36.

² HIRST, *Monopolies, Trusts and Kartells*, London, 1905, pp. 15 et seq. and 105 et seq. The object of their (i.e. Trusts and Kartells) formation is, of course, to increase profits by obtaining higher prices than can be obtained under competitive conditions. In other words, their supreme object is to create a monopoly. Thus the modern Trust or Kartell is simply a recrudescence of older forms of monopolistic combination. The main purpose which has led to the formation of Trusts and Kartells is that which has led to their formation under other names from the earliest records of economic history. Mr. Havermeyer's pedigree goes back to Thales; Mr. Leiter is the lineal descendant of Joseph's Pharaoh! They may talk of the economies of big undertakings, but what they are really after is, of course, to raise prices by eliminating competition.

into a few sentences and entirely overlooked the legislation in Rome, which became the basis of all later laws: he did not deal at all with the numerous counter arguments of the prevailing science. Consequently they did not influence the latter, and passed in the literature unnoticed.

CHAPTER II

Monopoly organizations in the Roman State.—Lex Julia de annona.—Lehnich's theory of the origin of old monopolies, as different from the origin of modern cartels.—Later Roman Anti-monopolistic legislation.—Dardanariat as synonym for the monopoly offence.—The edict of Diocletian.—The constitution of Zeno.—The Menzel-Grunzel controversy and the opinions of other writers on the relation of Zeno's constitution to cartel and trust problems.—Various theories on the economico-historical interruption between the old and the modern cartel

A SITUATION analogous to that in Greece prevailed in Rome. Ever since the earliest times we meet with laws directed against agreements of merchants, especially corn merchants who tried by stopping the import of corn and in other ways to check its supply, and maintain a uniform and as high as possible market price. These regulations applied also to others who speculated on a rise in prices,¹ particularly to provision merchants. They were prosecuted as speculators and usurers, to whom were given by later Roman sources the name *dardanarii*.² At first administrative fines were imposed,³ afterwards

¹ MOMMSEN, *Römisches Strafrecht*, Leipzig, 1899, p. 851: "Bei dem Grossgeschäft im Getreide fehlen die Hindeutungen auf *Hemmung der Korneinfuhr und auf Ringbildung zum Zwecke der Preissteigerung*, und übel beleumdet sind auch die *Waaren alle Art*, vorzugsweise aber Lebensmittel vertreibenden Zwischenhändler, die in der späteren Zeit, wir wissen nicht wonach benannten *dardanarii*."

² The meaning of the term *dardanarii* is explained on p. 101, post.

³ MOMMSEN, ut sup., pp. 851 and 853. We find traces of this practice in PLAUTUS' comedy *Captivi*, Act 3, Sc. 1, lines 32 et seq.: "Nunc barbarica lege certumst ius meum omne persequi qui concilium iniere, quo nos victu et vita prohibeant, is diem dicam, irrogabo multam, ut mihi cenas decem meo arbitratu dent, cum cara annona sit."

A similar sentence *ob annonam compressam* is mentioned also by

criminal penalties and even capital punishment were inflicted.¹

Aristotle's conception of the nature of a monopoly has been faithfully repeated in the Roman Law: where it was conceived as a *speculative art*. At times it had been deemed witchcraft even. Thereby special stress was laid on its *artificiality*;² thus, the most essential feature of any monopoly was expressed, viz. an *artificial* adjustment of the natural market tendency with a view to augmenting the profits of the originators or members of a monopoly by means of creating a factitious rise in the natural market prices.

As in Greece and in all other ancient countries, in the Roman State the private monopoly movement was strongest in the provision trade, chiefly in the corn trade, because the production of corn was by its nature the *first mass-production* intended for *mass requirements* and *mass sale*. Thus the corn trade, and other provision trades, were the earliest in economic history in which large transactions were made. Consequently, it attracted more merchants than any other, which in turn led to fiercer competition. The essential feature of this rival struggle was then, as it still is to-day, the continual efforts of each competitor at *least* to maintain his previous position, that is to say, to retain his market and customers as a kind of source of permanent income. But we often find a natural endeavour to expand sale and increase the income by all possible ways and means. Being the most effective, the monopolization of the market suggested itself first. Thus all earlier anti-monopolistic laws were directed at first against corn monopolies and only later against other monopolies.

The above fact is an important contribution to the explana-

LIVY. See *Titi Livi ab urbe condita libri*, lib. xxxviii, cap. 35: "... et duodecim clipea aurata ab aedilibus curulibus P. Claudio Pulchro et Ser. Sulpicio Galba sunt posita ex pecunia, qua frumentarios ob annonam compressam damnarunt."

¹ MOMMSEN, *ut sup.*, p. 852.

² Cf. p. 93, ante.

tions of the origin of monopolies. It gainsays the hypothesis generally held in economics (SOMBART),¹ and in the cartel literature (LEHNICH),² that the ancient private monopoly arose in times of an excess of *demand* over supply, in contradistinction to the modern cartels, which result from an excessive *supply*. This constitutes, according to this theory, the essential difference between old monopolies and modern cartels, although in other respects they show a *formal resemblance*.³ Later, I shall take several opportunities of demonstrating that this theory is mistaken.

Although there are definite proofs that monopolistic organizations existed in the Roman State at the close of the third and beginning of the second centuries B.C.,⁴ the oldest legislative act against monopolies that has been preserved to our days dates from the time of Julius Caesar, as indicated by the name of the act: *lex Julia de annona*.⁵

¹ SOMBART, *Der moderne Kapitalismus*, München, 1924, 4th ed., Vol. XI, p. 206: "... entstehen die heutigen Kartelle, so könnte man es ausdrücken, weil zu viel Konkurrenz da ist, so die der frühkapitalistischen Epoche (with still greater reason the older, according to Sombart), weil es zu wenig Konkurrenz gab."

² LEHNICH, *Kartelle und Staat*, Berlin, 1928, pp. 5 et seq.: "Gewiss haben wir es sowohl bei Wucher- als auch bei Monopolvereinbarungen mit Erscheinungen zu tun, die formell mit den Kartellen eine gewisse Ähnlichkeit aufweisen. Der grundlegende Unterschied besteht jedoch darin, dass das Kartell eine Regelung und Beschränkung des Wettbewerbes bei Überwiegen des Angebotes, die Wucher und Monopolvereinbarungen dagegen eine künstliche Preisbeeinflussung in Zeiten des Überwiegens der Nachfrage bezwecken." Similarly on pp. 23 and 39.

³ Cf. Lehnich's citation in the preceding note.

⁴ LIVY mentions in *Ab urbe condita*, lib. XXXVIII, c. 35, the sentence passed on the "*frumentarios ob annonam compressam*." Cf. also note on p. 97.

PLINIUS, *Historiae Naturalis*, lib. VIII, c. 57. He alludes to a lucrative monopoly of crabs which gave cause to many complaints: "Magnum fraud et ibi lucrum monopolis invenit, de nulla re crebrioribus senatus consultis, nulloque non principe adito querimoniis provincialibus."

⁵ *Corpus iuris civilis*, 1, 2 D 48, 12: "Ulpianus libro nono de officio proconsulis. *Lege Julia de annona* poena statuitur adversus eum, qui

This law protected the corn trade against the unnatural rise in prices and provided heavy fines against anyone who by whatever means, alone or in a *company* formed with others for this purpose, effected a rise in the price of corn. The direct or *indirect*, deliberate and insidious stoppage of ships carrying corn was a special case; whether corn became dearer or not, it always entailed the same penalty. Not only those who actually succeeded in bringing about a rise in the market price of corn were criminally prosecuted, but also an *attempt* to restrict its supply by intercepting its transport was considered an offence; even should this have been unsuccessful and no rise in price ensued in a given case.

As in Greece, a special administrative body saw to it that this law was observed.¹

From the tenor of the act it clearly follows that the act was combating not only individual cases of usurious corn prices when merchants profited on the insufficiency of supply (although this is the accepted view among writers on the subject),² but it was the main purpose of this law to prevent a *permanent and general dearness of corn* ("—*quo annona carior fiat*—"), resulting from systematic operations of traders, acting not only individually but on an understanding, which the act called "*societas*,"³ and which we would call to-day a *price-fixing cartel*.

conta annonam fecerit societatemve coierit, quo annona carior fiat. Eadem lege continentur, ne quis navem nautamve retineat aut dolo malo faciat, quo magis detineatur, et poena viginti aureorum statuitur."

¹ BABLED, *De la cura annonae chez les Romains*, Paris, 1892, is an exhaustive treatment of the whole corn policy and its administration in the Roman State. According to Babled (p. 166), the *lex Julia de annona* dates from the reign of Julius Caesar.

² For instance, LEHNICH, *Kartelle und Staat*, ut sup., pp. 5 et seq. and 9 et seq. Similarly ISAY, *Die Entwicklung der deutschen und ausländischen Kartellgesetzgebungen*, Berlin, 1930, p. 10; DE LEENER, *Syndicats industriels*, Bruxelles, 1904, p. ix; HUBER, F. C., *Die Kartelle*, Stuttgart, 1903, pp. 35 et seq.; LEHMANN, *Lehrbuch des Handelsrechts*, Berlin, 1921, 3rd ed., pp. 422 et seq.; and many others.

³ Cf. citation in note 5 on p. 98, ante.

Lex Julia de annona treated such companies not as separate subjects of the offence but as a means of committing it, and punished *not the company* but the *partners* like individual offenders. Having undoubtedly to deal with instances of monopolies *de facto* secured by individuals, like the cases mentioned by Aristotle, Roman legislation, in order to hit every actual monopoly, directed the blow at physical persons upon whom it could easily lay hold, no matter whether these persons organized monopolies by themselves or in company with others. The law did not go against the monopoly company as a whole, the apprehension and definition of which always presents many difficulties. Consistently following the same course, *Lex Julia* was applicable not only to merchants and corn traders, but anyone who attempted to make corn dearer.

The company character of the *fraudatae annonae* offence was pointed out also by later commentators on Roman Law, after its adoption in Germany, such as TIBERIUS DECIANUS,¹ ANTONIUS MATTHEUS, and others.² Their explanation that offenders

¹ DECIANUS, *Tractatus criminalis*, Francofurti ad Moenum, 1591, pp. 189 et seq., lib. XII, cap. XXII, *de fraudantibus, aut onerantibus annonam*. Says he on p. 190: "*Item lege monopolii etiam puniebantur, qui pactiones inibant, ut species, et annona carius venderetur.*"

"... Dardanarii autem erant praecipue illi, qui annonam onerabant."

"... Hec autem vox, Dardanarii ... significat eos, quos Graeci propolas vocant, qui praemunt omnia, ut carius vendant, quam devivari putant quidam a Duodam dardano impiissimo mago, qui fruges excantanbat ad sterilitatem et caritatem annonae, a quo Dardaniae etiam artes a Columella vocantur."

² MATTHEUS, *De criminibus ad Lib. xlvii et xlviii Dig. commentarius*, Trajecti ad Rhenum, 1644, p. 628: "... *Crimen autem fraudatae annonae contrahunt, qui contra annonam faciunt, societatemve contrahunt, quo ea carior fieret: Ut, qui navem nautamve retinent, aut dolo malo faciunt, quo magis detinetur. Qui species coemtas suppressunt, flagellant, ex raritate adfectantes caritatem.*"

S. 629: "Porro, qui annonam fraudant, fructus suos, vel annonam coemtam suppressendo, etiam Dardanarii appellantur, a Dardano quodam, ut Guil. Gentius suspicatur."

Similarly PLATNERUS, *Questiones de iure criminum romano praesertim de criminibus extraordinariis*, Marburgi et Lipsiae, 1842, p. 229.

against this law were also called *dardanarii*¹ is important because this term became later a synonym for the earlier *monopolium*. Both terms, *monopolium* and *dardanariat*, were used alternately in the Middle Ages and later to denote the same unlawful facts. *Dardanariat*, primarily confined to corn monopolies, included later other monopolies also, especially those of victuals. *Monopolium* had always a wider application, and referred to monopoly organizations in general. The science of that time had in accordance with practice (which is confirmed by Mattheus) treated the old Roman *crimen fraudatae annonae* as identical with the later *dardanariat*; it is, therefore, evident that both represented the same *monopoly offence*. Known as such in Greek and earlier law the same idea subsequently found its expression in cartels.

There are, however, no particulars extant as to the organization of the monopolies of that time. The act omitted them purposely, as they were immaterial for the essence of the monopoly *de facto*. The essential fact was that the activities of such company were intended to enhance, or resulted in the increase, of corn prices; in this respect the *societas* of the *lex Julia* tallies with the *price-fixing cartel* of to-day. Lafrenz was, therefore, not materially inaccurate when he translated the Roman *societas* of the *lex Julia* as "cartel,"² although Professor Lehnich erroneously maintains that the *lex Julia* dealt not with cartels but with monopolies or *collusions of users*. According to the latter, this follows from the economic (i.e. historic) connection, disregard of which largely contributed to a confusion of notions in the science of cartels.³ When speaking

¹ Cf. citations from Decianus and Mattheus in the two preceding notes.

² LAFRENZ, "Vom Dardanariat," in *Deutsche Strafrechtszeitung*, 1915, p. 150. He is the only one known to me in the German cartel literature, and that of other countries, who translated the Roman monopoly *societas* in this bold way. It is to be regretted that he did not produce evidence to prove his standpoint; this perhaps would have saved him from the objections of Professor Lehnich.

³ LEHNICH, ut sup., p. 9: "*Wenn 'societas' verschiedentlich mit 'Kartell'*

of the *economic connection*, Lehnich had in mind his theory described above that the origins of all monopolies and modern cartels are different, because in olden days demand exceeded supply, whereas in later, and in our times, supply surpasses demand.¹

If the stock of corn in Rome and in other markets would not really have met the total requirements, as Lehnich maintains, corn merchants could easily have sold corn dearer, without taking recourse to monopolist organizations. What need would there be for a voluntary restriction of the freedom of action, for binding into organizations, for limitation of the corn supply, by seizing ships loaded with cereals, etc.? Why should corn merchants run the risk of severe criminal responsibilities if even without their interference there never would have been sufficient corn on the market? They would always find someone who had to take corn "at any price."

In Rome, as well as in Greece, India, and all other countries, the legislation was directed particularly against corn and victual monopolies; and the artificial restriction of all corn was constantly emphasized. The same will be observed in all later legislation, especially in Germany, France, and England.² One can hardly assume that all countries without exception

übersetzt wird, so dürfte das unzutreffend sein, denn aus den Zusammenhängen ergibt sich, dass es sich hier nicht um Kartelle sondern um Tatbestände handelt, die als Wucher- bzw. Monopolvereinbarungen zu bezeichnen sind. Derartige ungenaue Übersetzungen, die die wirtschaftlichen Zusammenhänge nicht berücksichtigen, haben viel zur Verwirrung der Begriffe beigetragen."

As regards those "agreements of usurers" (*Wuchervereinbarungen*), Lehnich alluded to them several times, but, unfortunately, he never explained what he meant thereby. He also gives no sources from which he drew his information that these existed apart from monopoly organizations. So far as I am aware, on the ground of known historical sources, there existed neither in Rome nor anywhere else in those days and later any special "*agreements of usurers*." But often ordinary monopolies *de facto* had been branded as usurious organizations.

¹ See p. 98, ante.

² Cf. pp. 139 et seq., post.

suffered since the earliest times from a scarcity of corn. If this were the case there would be no possibility of importing corn from anywhere. Moreover, anti-monopolistic statutes repeatedly stated that monopolies were spreading in spite of good harvests¹ and an abundance of corn artificially restricted by monopolies.

Thus the Aristotelian conception of the *artificial* character of the monopoly movement occurs systematically in the whole early and later legislation, which would be senseless if the rise in the price of corn and other goods were only a *natural* consequence of their insufficiency on the market; in other words, the result of the excess of demand over supply, as Sombart and Lehnich maintained.

No doubt monopoly organizations often took advantage then, as they do now, either when they were formed or in their later existence, of the scarcity of a given merchandise. But these were *exceptional* cases. I have demonstrated above that an excessive demand placed merchants in a position equal to monopolies *without* an organization. Perhaps without the latter the profits obtained were not the highest possible under given circumstances, but on the other hand every entrepreneur (merchant) retained his full freedom of action, which naturally has been and is still for him particularly precious. He abandoned it or agreed to restrict it only when he was forced to do so or when he expected to considerably increase his profits thereby. Further, he had to bear in mind another advantage of keeping away from monopolies: if he was not connected with any monopoly organization he was safe from chicanery of the authorities and did not violate the rigorous law. Both these advantages were too great to be overlooked by him. Moreover, he was not troubled by competition and his goods were desired without the assistance of a monopoly organization, owing to the excess of demand over supply.

Consequently, monopolies originating in the struggle against

¹ E.g. in the Edict of Diocletian (cf. pp. 107 et seq., post) and in the French Ordonnances (cf. pp. 140 et seq., and 184 et seq., post).

rival competition and in the excess of supply over demand have always been the *rule*: monopolies which by all possible means strove to change the natural course of economic events, so unfavourable for them, and limited competition and supply. Both the history of the monopoly movement and the development of the anti-monopolist legislation afford ample proof of this. I am dealing with it exhaustively later. The perpetual repetition of the above-mentioned *artificiality* of the nature of the cartel may also be adduced as evidence.

After the *lex Julia*, the next law against monopolies which has been preserved to our times is contained in the forty-seventh book of the *Digest* (*de extraordinariis criminibus*).¹ We learn therefrom that the *lex Julia* was not the only one of its kind, but that a number of analogous statutes, *constitutiones*, and *mandata* were issued in Rome, and that they *could not stop the growth of the movement which expanded into new spheres*. The said law, which in the first instance was directed against corn monopolies, therefore extended its sanctions to monopolies of *all other goods*, not merely provisions (. . . *ne dardanarii ullius mercis sint*).

This law, like the *lex Julia*, opposed the *factitious restriction of supply* effected by the storing of goods, waiting for bad harvest, and so on, leading to a dictation of higher prices. The fact that monopolies at that time resorted to the limitation of supply, in spite of severe punitive sanctions, is further proof that supply was at least adequate, if not in excess of the demand.

¹ *Corpus iuris civilis*, l. 6, D 47, 11: "Idem (i.e. Ulpianus) libro octavo de officio proconsulis. Annonam adtemptare et vexare vel maxime dardanarii solent: quorum avaritiae obviam itum est tam mandatis quam constitutionibus. Mandatis denique ita cavetur: 'Preterea debetis custodire, ne dardanarii ullius mercis sint, ne aut ab his, qui coemptas merces, supprimunt, aut a locupletioribus, qui fructus suos aequis pretiis vendere nollent, dum minus uberes proventus expectant annona oneretur.' Poena autem in hos varie statuitur: nam plerumque, si negotiantes sunt, negotiatione eis tantum interdicitur, interdum et relegari solent, humiliores ad opus publicum dari."

In accordance with the conception of Roman law expressed in the *lex Julia*, no difference was made whether a person organized monopolies by himself or in company with others.

The penalty was, besides fines provided for by former enactments which remained in force: the withdrawal of the right to carry on the business, and, for people who were not merchants, compulsory public labour.

In the described law we meet for the first time with the expression *dardanarii*, as denoting monopolies *de facto*. It follows from the tenor of the act that it was not a novelty and that Roman law must have known it before. According to Mommsen the origin of this name is unknown,¹ but earlier writers like DECIANUS, MATTHEUS, and others derive² it from a certain *Dardanus*, supposed to be a well-known merchant in the period of the Roman Empire who distinguished himself by creating a rise in corn prices by means of various speculative and *magic stratagems* (*maleficis artibus*); hence the monopoly offence was called after him, in accord with Aristotle's idea of its artificiality, which was also generally accepted in Rome.

Mommsen does not mention these writers in his work, but, in common with the others,³ states that as the *praefectus annonae* controlled speculations in connection with all goods, not only corn, so was the application of the name *dardanarii* not restricted to the corn trade only, but embraced provisions in general.

¹ Cf. note 1 on p. 96.

² Cf. pp. 100 et seq., ante, and also BRUNNEMANN, *De dardanariis*, Altenburg, 1671, pp. 9 et seq.: "*. . . Dardanarii vocem originem debere dicunt Dardano profligatissimo cuidam et contaminatissimo Mago, qui maleficis artibus annonam in granaria sua avertere mensuras in admetiendo minuere solitus est. . . . Quis vero fuerit hic Dardanus ubi locorum vixerit, non adeo in comperto est.*"

BABLED, *De la cura annonae*, Paris, 1892, p. 166, explains in the same way the derivation of the name *dardanarii*, but adduces no sources on which he bases his assertion.

³ E.g. DECIANUS, ut sup., p. 190: "*Annonae autem appellatio omnia continere videtur, quae ad victum humanum, ut panis, vinum, acetum, lardum, et carnes.*"

From the Roman law this term spread to the German common law and served as so-called *Dardanariat* or *Monopolium* to denote specific *criminal* facts, including all cases of illicit augmentation of the prices of provisions and other articles of everyday use.¹ This name survived until the criminal common law was abrogated by the new Criminal Code of the German Empire. Yet to-day one lights upon the name "*dardanariat*" in the newest German legal literature, where it is employed in its original signification to denote analogous contemporaneous facts. Thus LAFRENZ² published, in 1915, an article bearing the title: "Vom Dardanariat," where he regrets that the German criminal code in force had not retained the *dardanariat* offence of the old common law, because it would have been a real bar against speculations in time of war (the article was written during the Great War). Further, he deemed it advisable to issue in this matter decrees *dardanariat*!

One has to take into consideration that Lafrenz, when speaking of war profiteering, had in mind the price policy of the German industrial and commercial *cartels* during the War. Further, it was not the purpose of his article to show the connection between the old institution of Roman law and the present conditions, but only to find effective legal means to combat the speculation during the War, carried on particularly by cartels. Finally, one cannot overlook the fact that Lafrenz is not an abstract theorist who could not live, as Professor Grunzel said, without trying to compress

¹ For the sake of the completeness of the description of the *dardanariat*, I may add that in the German literature the expression "*Kornjuden*," i.e. "*corn Jews*," was used in loose translation as synonym for *dardanarii*. (E.g. BRUNNEMANN gave to the above-mentioned book *De dardanariis* the sub-title "*von Korn-Juden*.") The name *corn Jews* has undoubtedly some connection with the fact that, since the earliest times, the corn trade was chiefly in the hands of Jews.

² LAFRENZ, "Vom Dardanariat," in *Deutsche Strafrechts-ztg.*, Berlin, 1915, p. 150.

every symptom of modern economic life into some obsolete drawer of Roman law, but a skilled practitioner, a Judge of the Court of Appeal in Hamburg, in constant touch with life. In view of the above the inseparable connection between the oldest monopolies *de facto* and the modern cartels, still observable in practice to-day, becomes more significant.

During the third century B.C. the Roman Empire entered on a period of grave economic crises, which first led to a complete economic breakdown, and during the second half of the fifth century brought about the political decline of the Western Empire. Consequent upon a prolonged and intense inflation and lack of credits monetary transactions disappeared almost completely and the barter system was slowly returning. Even taxes were paid to the State in kind. The treasure-chests changed—as Professor Brentano said—into State store houses.¹ This crisis was increased by the monopoly movement on the Roman markets. As usual in such times, the increasing number of monopolistic agreements of merchants not only aimed at a just self-defence of their threatened interests, but also endeavoured to take advantage of the crisis and enrich themselves through various illicit machinations, causing a usurious rise in prices. An eloquent corroboration of these conditions, bearing striking resemblance to some of our present crises, is to be found in the edict of DIOCLETIAN of the year 301, entitled “*de pretiis rerum venalium*.”²

¹ E. MEYER, *Die wirtschaftliche Entwicklung des Altertums*, Jena, 1895, pp. 61 et seq.; MOMMSEN, *Geschichte des römischen Münzwesens*, pp. 828 et seq.; BLÜMNER, *Der Maximaltarif des Diokletian*, Berlin, 1893, pp. 53 et seq.; BRENTANO, *Das Wirtschaftsleben der antiken Welt*, Jena, 1929, p. 185: “An die Stelle von Geldsteuern traten wieder Naturalsteuern mit aller sie begleitenden Willkür. Die öffentlichen Kassen wandelten sich in Staatsmagazine. An die Stelle der Grundsteuer trat die Annona.”

² The Edict of Diocletian, partly reconstructed from thirty-five loose fragments found by TH. MOMMSEN in the second half of the nineteenth century, is contained in the latter's *Corpus inscriptionum Latinarum*, Vol. III, pp. 1926–1953, *Edictum Diocletiani de pretiis*

This edict is particularly important and instructive to-day owing to the analogy of its provisions intended to bring down the high prices of articles of everyday use previously inflated by monopoly organizations, with similar measures taken recently in some countries, as in Germany,¹ although their futility and impracticability had been fully exhibited as far back as the year 301. Also the reasons given for the issue of these provisions, expounded in the introduction to the edict, are noteworthy. They read like articles against cartels and trusts from our contemporaneous press. And so the Edict saw the main cause of the crisis *in the greediness of some of its citizens* (i.e. merchants and artisans), *in their shameless and wicked practices, whose insatiable lust of robbery neither rich booty nor abundance of goods could still*, and similar phrases.²

rerum venalium, Berlin, 1893. The original text of Diocletian's edict is also given in full by BLÜMNER in his carefully arranged commentary on the edict, *Der Maximaltarif des Diokletian*, Berlin, 1893, pp. 1-50. Professor BLÜCHER'S "Die diokletianische Taxordnung vom Jahr 301," in *Ztschr. f. d. gesam. Staatswissenschaft*, Vol. 50, pp. 189 et seq. and 672 et seq., is also commendable.

¹ The famous *Notverordnungen* of Chancellor Brüning's Government concerning the compulsory reduction of the cartel prices of a number of goods, issued as decrees of the President of the Reich at the end of 1931 and beginning of 1932.

² *Edictum Diocletiani*: ". . . Ad remedia igitur iam diu rerum necessitate desiderata prorumpimus, et securi quidam querellarum, ne ut intempestivo aut superfluo medellae nostrae interventus vel apud improbos levior aut vilior estimaretur qui tot annorum reticentiam nostram praeceptricem modestiae sentientes sequi tamen noluerunt. Quis enim adeo optumsi pectoris et a sensu humanitatis extorris est, qui ignorare possit, immo non senserit in venalibus rebus, quae vel in mercimoniis aguntur vel diurna urbium conversatione tractantur, in tantum se licentiam difusisse pretiorum, ut ut effrenata livido rapiendi *nec rerum copia nec annorum ubertatibus mitigaretur? ut plane eiusmodi homines, quos haec officia exercitos habent, dubium non sit semper pendere animis etiam desiderum motibus auras ipsas tempestatesque captare, neque iniquitate sua perpeti posse ad spem frugum futurarum inundari superis inbribis arva felicia; ut qui detrimentum sui existiment caeli ipsius temperamentis abundantiam rebus provenire.*"

The remedies for the crisis were designed according to the views on its nature. The old *system of maximum tariffs* had, despite its proved ineffectiveness, been rendered more rigid in two respects.¹ As opposed to older tariffs which included only some categories of goods, chiefly foodstuffs, the Edict of Diocletian covered all main provisions and industrial products and partly also the remuneration of some kinds of labour. The Edict also retained in force the lower prices of certain merchandise in some of the provinces and localities of the Empire, where they were cheaper, owing to their exceptional abundance. The non-observance of these lower market prices carried the same penalty as the violation of the maximum goods tariffs.²

Secondly, the severity of the penalty was increased. For the violation of the tariff was punished by *death*. A very interesting ground is adduced for its introduction. By the experience, the Edict said,³ that only the threat of punishment

¹ BRENTANO, ut sup., p. 185, shows that before Diocletian the Emperors Tiberius, Commodus, and Alexander Severus vainly tried to avert, by means of maximum tariffs, an advance in the prices in the Roman State.

² *Edictum Diocletiani*: “. . . Placet igitur ea pretia, quae subditi brevis scriptura designat, ita totius orbis nostri observantia contineri, ut omnes intellegant egrediendi eadem licentiam sibi esse praecisam; non impedita utique in his locis, ubi copia rerum perspicietur affluere, vilitatis beatitudine, cui maxime providetur, dum praefinita avaritia conpescitur.”

³ *Edictum Diocletiani*: “. . . Quia igitur et apud maiores nostros hanc ferendarum legum constat fuisse rationem, ut praescripto metu conpexeretur audacia—quod rarum admodum est humanam conditionem sponte beneficium deprehendi, et semper praeceptor metus iustissimus officiorum invenitur esse moderator—placet, ut, si quis contra formam statuti huius conixus fuerit audentia, *capitali periculo subiugetur*. . . . *Eidem autem periculo etiam ille subdetur, qui comparandi cupiditate avaritiae distrahentis contra statuta consenserit.* [Accessories and principal actor were punished alike!] Ob eiusmodi quoque noxa immunis nec ille praestavit, qui habens species victui adque usui necessarias post hoc sivi temperamentum existumaverit subtrahendas; cum poena vel gravior esse debeat inferentis paenuriam quam contra statuta quotientis.”

could deter the offender and that fear of this is the best teacher of duties, the death penalty would be inflicted on anyone who knowingly violated the provisions of the Edict. The accessories were treated in the same way as the principals. Buyers, too, were subjected to the same punishment.¹

The Edict enumerated by way of example as special cases: the complicity for the desire of gain in the "greedy" practices of the person buying up the merchandise, concealment of foodstuffs, and the *artificial bringing about of their scarcity* (monopolies). In conformity with the principle adopted by Roman law, the Edict was not dealing with monopolies as such, but with their members, *physical* persons, who were proceeded against in the same manner as *individual offenders* acting independently; possibly in a given case they might have been treated as accomplices in an offence committed by another physical person, and not by the monopoly company as such.

To protect the public against exploitation by merchants and others, Diocletian issued about the same time the famous provision on "*laesio enormis*,"² which became the basis of all later laws against usury.

As might have been easily foreseen, the Edict of Diocletian, which disregarded economic realities, could not long be maintained. Most likely it was repealed immediately after the abdication of Diocletian in the year 305.³ Now the legal

¹ MOMMSEN, *Römisches Strafrecht*, Leipzig, 1899, p. 853.

² *Corpus iuris civilis*, c. 2, C 4, 44: "Rem maioris pretii si tu vel pates tuus minoris pretii distraxerit, humanum est, ut vel, pretium te restituyente emptoribus, fundum venditum recipias, auctoritate iudicis intercedente, vel, si emptor elegerit quod deest iusto pretio recipias Minus autem pretium esse vedetur, si nec dimidia pars veri pretii soluta sit."

³ BLÜMNER, *ut sup.*, p. 55. STERN, *Der Höchstpreis*, München, 1923, pp. 104 et seq. and 276, justly compares the old policy of maximum tariffs to the course taken to-day in numerous states as being exactly alike: the scale of prices is used as one of the main instruments to combat the monopolistic and exorbitant prices of industrial and commercial cartels, although history proves that such policy has failed always and everywhere. Stern states on p. 103 that "ewig

position remained the same as it was before the Edict of Diocletian, which had not abrogated the older enactments in the matter.

After the fall of the Western Empire the Roman anti-monopolistic legislation continues in the Eastern Empire.

Two imperial constitutions of the second half of the fifth century are to be recorded. They are contained in the Justinian Code under the significant heading: "*On monopolies and illicit agreements of merchants or on prohibited and unlawful practices of artisans, master-mechanics, and owners of baths.*" The last of these enactments, the Constitution issued by the Emperor ZENO in the year 483, is the most important contribution of the Roman era to the history of the monopoly movement and its legislation.¹ The earlier Constitution of the Emperor Leon

wahr bleibt das Wort des weisen Rabbi Akiba, dass alles schon da war, und ewig wahr bleibt die Erfahrung aller Zeiten, dass man aus der Geschichte lernen soll, und es docht nicht tut. Die Geschichte aller Zeiten und aller Völker scheint Eingriffe in die freie Preisbildung, scheint die Festsetzung von Preisen oder Preisgrenzen, die Festsetzung der Entgelte beim Austausch von Leistungen gekannt zu haben."

¹ *Corpus iuris civilis*, c. 2, C 4, 59.

De monopolis et de conventu negotiatorum illicito vel artificum ergolaborumque nec non balneatorum prohibitis illicitisque pactionibus.

2. Imp. Zeno a Constantino. Jubemus, ne quis cuiuscumque vestis aut piscis vel pectinum forte aut echini vel cuiuslibet alterius ad victum vel ad quemcumque usum pertinentis speciei vel cuiuslibet materiae pro sua auctoritate, vel sacro iam elicto aut in posterum eliciendo rescripto aut pragmatica sanctione vel sacra nostrae pietatis adnotatione, monopolium audeat exercere, neve quis illicitis habitis conventionibus conturaret aut pacisceretur, ut species diversorum corporum negotiationis non minoris, quam inter se statuerint, venundentur. Aedificiorum quoque artifices vel ergolabi aliorumque diversorum operum professores et balneatores penitus arceantur pacta inter se componere, ut ne quis quod alteri commissum sit opus impleat aut iniunctam alteri sollicitudinem alter intercapiat: data licentia unicuique ab altero inchoatum et derelictum opus per alterum sine aliquo timore dispendii implere omnique huiusmodi facinora denuntiandi sine ulla formidine et sine iudicialiis sumptibus. Si quis autem monopolium ausus fuerit exercere, bonis propriis spoliatus perpetuitate damnetur exilii. Ceterarum praeterea professionum primates

contained in the first chapter of the same title (c. 1, C 4, 59) is only fragmentarily preserved, from which it is impossible to draw any positive conclusions. Only one thing is certain—it dealt with the same subject, because both constitutions were placed under a common heading.¹

Similarly to all former enactments in Rome described above, the constitution of Zeno protected consumers against an artificial increase in the price of all foodstuffs and other articles of everyday use. The prices were regulated either by their natural market trend or by official rates. Retaining the individual responsibility of the physical persons, the constitution of Zeno laid stress at the same time on the *joint* action in the monopolistic organizations. This standpoint we do not find in any other known anti-monopoly law;² here it has been expressed even in the title, which opposes *monopolies and illicit agreements* between merchants or artisans. It is here for the first time that we meet with the expression *monopoly*. From the tenor of the act it is evident that this was not a new term in the Roman legislation; on the contrary it must have been known formerly, and as such it is used by the constitution of Zeno. This is also confirmed by Aristotle, who described, as far back

si in posterum aut super taxandis rerum pretiis aut super quibuslibet illicitis placitis ausi fuerint convenientes huiusmodi sese pactis constringere, quinquaginta librarum auri solutione decernimus: officio tuae sedis quadraginta librarum auri condemnatione multando, si in prohibitis monopolis et interdictis corporum pactionibus commissas forte, si hoc evenierit, saluberrimae nostrae dispositionis condemnationes venalitate interdum aut dissimulatione vel quolibet vitio minus fuerit executum.

¹ The constitution of Leon probably regulated the procedure of the magistrates when monopolistic rights were granted by the State to private persons. E.g. MENZEL, *Die Kartelle u. die Rechtsordnung*, Leipzig, 1902, pp. 13 et seq.

² *Illicit companies (societates)* tending to raise the corn price, that is to say, monopolies, had been mentioned by the earliest known anti-monopolistic law, the *lex Julia de annona*, which treated them, however, only as one of the methods by which individual physical persons brought about dearness of corn (cf. note 5 on p. 98).

as the fourth century, the idea of a monopoly (*μονοπωλίαν*) as generally known and applied for a long time.³

The constitution of Zeno was directed, not only against all possible kinds of *strictly private monopoly de facto* in industry and commerce, but also against all private monopolies exercised by virtue of a *Caesarean rescript or any other enactment* already issued *or to be issued in future*. Caesar Zeno felt himself constrained to rescind all exclusive rights which had been already conferred, as well as to guarantee by law the ineffectiveness of all private monopolies which might be granted *in future* by himself or his successors.

Both monopolies *de facto* and monopolies granted and exercised on the ground of a Caesarian privilege are referred to in Zeno's constitution in one and the same sentence by the common term "*monopolium*"; and, rightly, there is no distinction drawn between them, as both monopolies manifest themselves, in spite of their different legal bases, as one phenomenon as regards their economic *effect*. It is highly important to realize this, in order to comprehend the true nature of the old monopolies *de facto*. Further, this constitution forms one of the most valuable legal documents in the history of Roman Law, refuting the assertion usually repeated in the cartel literature that the old monopolies *de facto* were simply a *single transitional speculation*, consisting in the accumulation of the largest possible stock of a given merchandise so as to temporarily effect a usurious rise in the price. As such the old monopolies, under the name of "*rings*," are thus contraposed to the cartels of to-day.¹

From the tenor of Zeno's constitution it clearly and unequivocally follows ("*. . . pro sua auctoritate, vel sacro iam elicit*

¹ For instance, KEEL, *Industrielle und kommerzielle Ringe und Kartelle*, Zürich, 1897, p. 60; ISAY, *Entwicklung der Kartellgesetzgebungen*, ut sup., pp. 3 and 6; LANDESBERGER, *Verhandlungen des 26. Juristentages*, Vol. II, p. 299; STEINMANN-BUCHER, *Wesen und Bedeutung der gewerblichen Kartelle*, p. 483; GRUNZEL, *Über Kartelle*, p. 15; and many others.

aut in posterium eliciendo rescripto . . . monopolium audeat exercere . . .")¹ that monopolies *de facto* were exercised in the same way as monopolies received by a concession. *The existence of both was, as a rule, founded on a permanent and systematic organization, and did not consist in a sporadic speculation.* "As a rule," because it might have happened at times that the monopoly *de facto* was not successful, and failed for various reasons independent of its founders, which has also been experienced by modern cartels. But such exceptions, even if they were numerous, could not change the explicit contrary rule.

In the same sentence in which Zeno's constitution deals with monopolies *de facto* and *de jure*, it also mentions as special matter of fact that merchants adjusted the market price by means of mutual agreements not to undersell. Our modern price-fixing cartels! This comparison of the price-fixing cartels to the monopolies elucidates the nature of the old monopolies of fact and shows that already in those days the former had been rightly understood.

The constitution of Zeno consistently combated any form of monopolization of economic life and condemns similarly to the code *Kautilya*² not only those of merchants but also analogous combinations of *producers (artisans), employers, and employees*. Especially there were forbidden agreements of artisans or labourers to the effect that none of them would finish the work given to another or take away the other's work. Now everybody had the right to complete, without fear of any harmful consequences, the work which another had commenced and then given up. Arbitrary abandonment of work was illegal and the informer had nothing to fear and incurred no law costs.³

¹ See note 2 on p. 111.

² An analogous provision was contained in the old Indian code *Kautilya* (cf. p. 89).

³ See p. 111, note 2.

From these exceedingly interesting provisions of Zeno's constitution it follows that in the Roman Empire there existed not only unions of industrialists (employers), like master builders, owners of baths, enumerated by way of example, and of all others, but that there were also trade unions of workers, counterbalancing the former, which by a monopolization of the market strove to secure for its members the best conditions of labour. The organization of these trade unions must have been strong, as it could enforce solidarity of its members by means of penalties for default not nearer described in the constitution; in particular these unions did not allow members to undertake work belonging to or abandoned by another labourer.

Undoubtedly the relations between these trade unions and manufacturers' associations were already in those days strained, and endangered the normal development of economic life, since the constitution so strongly opposed both. It further proceeded against any attempt to strike, and wilful abandonment of work commenced became a criminal offence. This we may deduce from the clause giving to everybody the right to report any such case *without thereby incurring law costs (sine iudiciariis sumptibus)*,¹ i.e. report to the court.

The penalties provided for by the constitution were very severe. The formation and exercise of a monopoly was threatened with confiscation of property and lifelong banishment, as in Greece in Aristotle's day.² All other illicit collusions mentioned in the constitution were liable to a heavy fine of 50 gold librae. Thus the legislator did not revert to capital punishment, which had been provided for by the Edict of Diocletian. The latter was, so far as we know, the last law appertaining hereto before the constitution of Zeno, but as it was soon repealed, it was but of fragmentary significance in

¹ See p. 111, note 2.

² ARISTOTELES, *Politikon*, I, c. IV, 7-8. Information whether monopoly was punished by banishment also in other epochs in Greece is not available.

the Roman anti-cartel legislation. The penalties of the constitution of Zeno, as compared with former provisions, were considerably more severe.

The penal clause imposed also a heavy fine of 40 gold librae on any official who, by corruption, negligence, or any other transgression did not duly carry out the judgments pronounced on the ground of this constitution.¹ Evidently cases of evasion of the severe sentences on monopolists must have been frequent in one way or another.

The constitution of Zeno is not only a most valuable monument of the Roman legislation, but it also authentically demonstrates that monopolistic tendencies were in those days strong in all spheres of the economic life; tendencies the nature of which exactly corresponds to the policy of cartels and trusts to-day. The reaction of the wide circles of public opinion against monopolies must have been vigorous, as the Emperor felt himself constrained, against his own policy and interests, to declare void all monopolies granted or to be granted.

Actually the constitution of Zeno did not bring about any change, it rather made the former situation worse. Later sources show that the Emperor Justinian continued basing his economic policy on a system of monopolies despite the opposite principles of his own constitution. Although these were not monopolies granted to private persons, but were State monopolies managed by imperial officials, the effects felt by the people were worse than if they had been private. The State monopolized by its undertakings the manufacture of silk goods, etc. The trade in the indispensable victuals, such as corn, bread, meat, olive oil, and wine, was taken from private merchants and put under the management of special officials, who took the place of the old private monopolists licensed by the Emperor. In their official character they increased prices without fear of criminal prosecution, and, worse still, they did it not so much in the interest of the treasury as to the advantage

¹ See p. 111, note 2, in fine.

of their own pockets. Such a state of affairs continued also under the successors of Justinian until the beginning of the thirteenth century.¹

The monopolistic corporations of artisans condemned by the constitution of Zeno became in the second half of the ninth century an official and compulsory organization of the whole manual industry.² They essentially correspond to the later guilds in the West and modern compulsory cartels (syndicates). To this problem a later chapter will be devoted.³

The close connection of the Roman private monopolies and the modern cartels stood out so boldly in the constitution of Zeno that it must have attracted the attention of those who did not confine themselves to the study of their contemporaneous cartel movement in the last decades, but searched for its beginning in older times, in spite of the prevailing opinion accepted *a priori*.

The first in the contemporaneous cartel literature who observed this notable connection was Professor MENZEL.⁴

¹ HÜLLMANN, *Geschichte des byzantinischen Handels bis zum Ende der Kreuzzüge*, Frankfurt a/O, 1808, pp. 11 et seq.; BRENTANO, *ut sup.*, pp. 204 et seq.; LEBEAU, *Histoire du Bas-Empire*, Paris, 1773, pp. xvi, 125 et seq.

² NICOLE, *Le livre du préfet ou l'édit de l'empereur Léon le sage sur les corporations de Constantinople*, Genève et Bâle, 1894; STÖCKLE, *Spättrömische und byzantinische Zünfte*, Leipzig, 1912.

³ See p. 168 et seq., post.

⁴ MENZEL, "Die wirtschaftlichen Kartelle u. die Rechtsordnung," *Schriften d. Vereins für Sozialpolitik*, Leipzig, 1894, Vol. 61, p. 32; later repeated in the book *Die Kartelle und die Rechtsordnung*, Leipzig, 1902, p. 12: ". . . Es ist nämlich gar nicht wahr, dass die heutigen Unternehmer-Verbände eine völlig neue, bis vor kurzem unbekannte Erscheinung darstellen. Solche Verbände zum Zwecke der Einschränkung der Konkurrenz, zur Monopolisierung eines Erwerbszweiges hat es schon im Altertum und im Mittelalter gegeben. . . . Ja die Gesetzgebung über die Kartelle und Ringe reicht weit zurück, wenn sie auch heute fast in Vergessenheit geraten ist. Schon das alte römische Recht beschäftigt sich bei zwei verschiedenen Anlässen mit den Unternehmerverbänden." He cited there the two Imperial constitutions on monopolies of Leon and Zeno which are contained in the fourth book of Justinian's Code.

In a paper read in 1894 before the German "*Verein für Socialpolitik*" he admitted that modern cartels had not appeared until the seventies of the last century, but at the same time he added that the current opinion that combinations of industrialists are a quite novel phenomenon is incorrect. Such organizations for the restriction of competition and monopolization of a certain branch of industry existed as early as the ancient times, especially they were known in Roman law. In the Middle Ages we note them in crafts, commerce, and transport. To-day they are new only in the big industries, and only their present form of organization is new. But when Professor GRUNZEL,¹ replying to Menzel, ironically reproached the latter with seeing in *the Roman Emperors the fathers of the cartel legislation* and going back unnecessarily instead of investigating the nature of the cartel problem, and lastly, seeking, as lawyers on the whole do, to pen phenomena of modern economic life in some suitable institutions of Roman law, Menzel did not know how to defend his own correct view and had not even the courage to admit having made the claim. He excused himself by saying that he never passed off the Roman Emperors as the fathers of the cartel legislation; and the reproach of a romanizing tendency he considered altogether ridiculous, as in all his writings he had constantly endeavoured to grasp every legal institution according to its peculiarities.²

¹ GRUNZEL, *Über Kartelle*, Leipzig, 1902, p. 143: "Es ist unser Unglück, dass die Juristen ihre Hauptaufgabe darin erblicken, die Erscheinungen des modernen Wirtschaftslebens in das Prokrustesbett der altrömischen Rechtsbegriffe hineinzupferchen; was nicht hineingeht, wird abgeschnitten. Nur mühsam brechen sich moderne Rechtsbegriffe Bahn. . . Als uns nun die neueste Zeit vor das Kartellproblem stellte, suchte die Rechtswissenschaft zuerst nicht nach dem Wesen dieses Problems, sondern nach einem passenden Kästchen aus dem römischen Recht. Ein solches fand sich auch, und so dürfen wir uns nicht mehr wundern, wenn MENZEL die römischen Kaiser als Väter der Kartellgesetzgebung ausgibt, obwohl er selbst zugesteht, dass 'die modernen Kartelle kaum vor dem Jahre 1873 aufgetreten sind.' "

² MENZEL, *Die Kartelle u. die Rechtsordnung*, ut sup., p. 62: 'Ebenso verfehlt ist die Bemerkung Grunzels, dass ich die römischen

The reasonings of KEEL¹ are a typical instance of the inconsistency of those who claim the novel character of the cartel movement and begin with the old private monopolies, which they oppose under the name of *rings* as something entirely different from the modern cartels. Keel belongs to that not numerous group of writers which occupied itself with the old monopolistic organizations in Rome.

Keel, when discussing the clause of Zeno's constitution which prohibits merchants to make agreements not to undersell, rightly likened them to the present *price-fixing cartels*.² But at the same time he stated, in concert with the current view, that cartels are a contemporaneous phenomenon not known before. All that had existed formerly were simply *speculative rings*, and cautiously he adds, though at variance with himself, that if cartels were among them *these were only of a very primitive form; cartels of a higher rank as well as trusts are quite modern institutions*.³ Thus he contradicts himself. The question when cartels appeared must not be confused with their outward forms. Their structure altered in different

Kaiser als Väter der Kartellgesetzgebung ausgegeben habe. *Der Vorwurf romanisierender Tendenz ist geradezu lächerlich gegenüber einem Autor, der in allen seinen Schriften bemüht ist, die modernen Rechtsercheinungen in ihrer Eigenart zu erfassen.*" Cf. citation of Menzel on p. 117, note 4.

¹ KEEL, *Industrielle und kommerzielle Ringe und Kartelle*, Zürich, 1897. The formulation itself of the subject and the title in which he couches the topic can be hardly reconciled with the view he presents. If the cartels are essentially different from the rings, why place these unlike institutions side by side as equal?

² KEEL, *ut sup.*, p. 60: "Im weiteren verbietet Zeno Vereinbarungen von Produzenten oder Kaufleuten, des Inhalts, eine Ware nur zu einem gemeinsam fixierten Preise zu verkaufen, *mit anderen Worten die Bildung eines Preiskartells—wie wir es im ersten Teil unserer Abhandlung dargestellt haben*—(on pp. 13 et seq., he represents the modern price-fixing cartels) *ist untersagt.*" Similarly he says on p. 61: ". . . Die Konstitution verbietet demnach auch eine Art *Absatz- oder Kundenkartell*," when discussing the prohibition of the constitution against agreements of artisans, etc.

³ KEEL, *ut sup.*, p. 52.

times and under varying conditions, but their essence remained always the same. Keel himself admitted this indirectly by calling monopolies of the days of the Emperor Zeno price-fixing cartels (*Preiskartelle*).

Simultaneously with Keel, LIEFMANN also similarly contrasted Roman and medieval combinations with the present cartels as *rings*. Whilst Keel devoted almost twenty pages to them before he came to his conclusion, Liefmann dismissed the problem in one sentence. He repeated after Menzel that there were constitutions of the Emperors Leon and Zeno on monopolies and a number of German *Reichsabschiede* and *Reichspolizeiordnungen*. And this he did only in his work on cartels, published in 1897.¹ In his principal work, *Kartelle und Trusts*, which followed later, he chose throughout its eight editions to leave out this brief mention concerning the laws against monopolies in Rome. He confined himself to the vague remark that ancient and medieval times knew loose combinations of monopolists taking the form of rings only.²

Into the same inconsistency as Keel WALDECK also twice fell in his contributions to the latest German literature. This writer admits that the cartel idea is not new and was known before in Rome, where cartels embraced many spheres of commerce and transport.³ He begins with the Roman con-

¹ LIEFMANN, *Die Unternehmerverbände (Konventionen, Kartelle)*, Freiburg, 1897, pp. 124 et seq. and 135 et seq. "*Altertum und Mittelalter kennen freie monopolistische Vereinigungen nur in der Form der Ringe, und diese waren durchaus nicht selten, wie die von Prof. MENZEL erwähnten beiden in den Kodex Justinianus aufgenommenen Konstitutionen der Kaiser Leo und Zeno über die Monopole aus dem 5. Jahrhundert n. Chr. und die verschiedenen Reichsabschiede und Reichspolizeiordnungen, die sich mit dem Gegenstande beschäftigen, beweisen.*"

² LIEFMANN, *Kartelle und Trusts*, Stuttgart, 1904, p. 9. And also in the last (eighth) edition of 1930, on pp. 19 et seq.

³ WALDECK, *Deutsches und internationales Kartellrecht*, Berlin, 1922, p. 1: "*Der Kartellgedanke ist nicht neu. Das alte Rom kannte bereits das Kartell der Ölpächter, eine Art Submissionskartell, und andere für Handel- und Transportwesen eigens gegründete Wirtschaftsvereinigungen.*"

stitutions of the fifth century, but at the same time he doubts whether they referred to cartels as understood to-day.¹ In any case, concludes Waldeck, these organizations did not only in certain forms resemble modern syndicates, as claimed by Keel, but were similar to them in their essential properties ("*den heutigen Syndikaten wesensähnliche Organisationen*"). So Waldeck questions simultaneously on the one hand the relationship of the modern cartels with the Roman monopolies, and on the other hand queries the view prevailing in the literature which rejects such connection, but just because of the ostensibly quite different essential properties of these phenomena.

A few years later the same question is again sounded by Professor Lehnich. He came to the conclusion that some of the specific facts embraced by the constitution of Zeno appertained also to cartels, but only *formally*, as opposed to Waldeck, who saw a similarity of their substance and not merely of their forms. Lehnich said that economic conditions in the Roman State were entirely different, and consequently the constitution proceeded not against cartels, but against people who profiteered on the uncertainty of the price trend, putting prices up when goods were scarce.²

Such arbitrary interpretation of Zeno's constitution, unsupported by any argument, is a logical sequence of Lehnich's hypothesis mentioned above,³ that old monopolistic combinations owe their origin to the excess of demand over supply,

¹ WALDECK, *ut sup.*, p. 1: "Es mag allerdings fraglich sein, ob die Konstitutionen römischer Kaiser aus dem 5. Jahrhundert, . . . ferner die Reichsabschiede und die Reichspolizeiordnungen zu Beginn der Neuzeit, welche 'Monopolia und schädlichen Fürkauf' bekämpften, das hier behandelte Rechtsgebilde betrafen."

² LEHNICH, *Kartelle und Staat*, Berlin, 1928, p. 11: "Ein Teil der in der Verordnung genannten Tatbestände trifft formell auch auf Kartelle zu. Aus dem Zusammenhang geht aber ohne weiteres hervor, dass die damaligen Wirtschaftsverhältnisse andere Erscheinungen zeitigten und dass die Verordnung gegen die Ausnutzung der Unsicherheit der Preisbildung und die Preistreiberei bei bestehender Warenknappheit abgestellt ist."

³ Cf. pp. 98 and 101 et seq.

as opposed to modern cartels which are formed because supply surpasses demand. By admitting that cartels go back to the Roman times Lehnich would have upset his whole theory of the difference between old private monopolies and modern cartels. To have been consistent he should not have admitted that Zeno's constitution *also referred to cartels*, since according to his opinion they could not have existed under the economic conditions of that time. How could it be that a law referred to one thing and at the same time proceeded in practice against something entirely different? The reservation that the constitution only *formally*¹ appertained to cartels does not uphold his thesis; on the contrary it proves its falsity more clearly. One has to take into consideration that cartels always have been and will be a wholly economic notion, and therefore a *material* conception and not a formal one. Cartels have never been and never are tied to any particular legal form, and, incidentally, there is no such form. This has been realized by the legislator ever since the oldest anti-monopolistic laws, which defined the *substance* of the monopoly offence, and not the *form* it took. Such a construction was also accepted by Zeno's constitution. Hence the assertion that this law applied only formally to cartels becomes untenable.

Again, other authors do not want to connect Roman monopolies with modern cartels, primarily because of the presumed interruption which historically severed them. The first who set forth this argument was Professor MARTIN SAINT-LÉON. This author compares, in his writings, cartels and trusts to Roman monopolies as being analogous, and for proof he refers to the constitution of Zeno.² Contrary to the writers previously mentioned, Martin fully acknowledges the identity of those economic phenomena consisting in the *restriction of competition*. Nevertheless, he does not want to unite them into one entirety because of the ostensible historical inter-

¹ Cf. p. 121, note 2.

² MARTIN SAINT-LÉON, *Cartells et trusts*, Paris, 1903, pp. 4 sqq.

ruption. The fact that the law of February 2, 1791, put an end to corporation system by abolishing craft-guilds and introducing the principle of freedom of production, labour, and exchange, broke the continuity.

According to Martin modern cartels and trusts are a product of the nineteenth century, and a result of fierce competition and a fall in prices caused by the introduction of machinery and mass production which goes hand in hand with it, and also the overproduction during the years 1830-70. Until then the first cartels and trusts could not have sprung up as a remedy and reaction of producers against an abused free competition. On this point his opinion tallies with the prevailing one.

Now in another place Martin overthrew his own thesis when stating that after the year 1791, in spite of the abolition of corporations, the *old agreements of producers or merchants* were secretly continued, since the law could not change economic conditions.¹ So after all there was a historical continuity!

Recently RUDOLF ISAY made also use of the historical interruption, though it is differently constructed in his case. He is one of those few German specialists on the cartel movement who recognized the necessity of taking history into account when investigating modern combines. Notwithstanding this his conclusions are mostly negative. Isay, discussing the constitution of Zeno, admits that the enactments of that time *appear to be akin to those of to-day*.² Nevertheless, he thinks

¹ MARTIN, *ut sup.*, pp. 11 et seq.

² ISAY, *Die Entwicklung der deutschen und der ausländischen Kartellgesetzgebungen*, Berlin, 1930, p. 3: "Wohl besitzen wir auch aus früherer Zeit, namentlich aus dem Altertum, Überlieferungen über Wirtschaftsvorgänge und Gesetzgebungen, die den heutigen ausserordentlich verwandt erscheinen. Die bekannteste ist die *Constitutio des Kaisers Zeno gegen die Monopole*. . . . Indessen kann eine Betrachtung dieser Gesetzgebungen kein Material zur Erklärung der Gegenwart liefern. Einmal, weil wir über die wirtschaftspolitischen Anschauungen, die ihnen zugrunde liegen, zu wenig wissen. Vor allem aber, weil der Zusammenhang zwischen jenen Erscheinungen und der Gegenwart zerrissen ist. Von der Gegenwart trennen sie zahlreiche Jahrhunderte erst der Naturalwirtschaft und später der Zunftverfassung."

that an examination of the conditions of those times could by no means be conducive to a better understanding of the present. First, because we know so little about the economic and political considerations which guided the legislator at that time. Secondly—and this is more important—there is an interruption between the old and modern institutions which was occupied by a reversion to barter economy and later a guild system.

His argument of the scant information on the economic-political views during the ancient times is only partly correct. Although the information is scarce, it is, as I have already attempted to demonstrate, not so insufficient as to deserve complete disregard. The information available concerning the cartel and monopoly movement respectively has not been compiled systematically into one whole. It is, therefore, somewhat difficult to form a right judgment of the significance of those combinations and their relationship to modern forms.

Now the argument of the interruption, owing to the period of barter economy, has been partly refuted by what I have said before when considering the edict of Diocletian.¹ A state of barter economy began to prevail in the Roman State in the second half of the third century A.D., and the monopoly movement did not recede, but rather increased in strength, holding fast where the capitalistic forms remained.

When with the fall of the Western Empire the West went over to barter economy, the capitalistic system, and with it the monopoly movement, flourished uninterruptedly in the Eastern Empire.² Moreover, some seaport towns in Italy, even after the fall of the Western Empire, did not go over to a barter system but faithfully maintained capitalist traditions, owing to their active commercial relations with the Eastern

¹ Cf. p. 107, ante.

² Cf. p. 116 et seq., ante.

countries.¹ Thus there have been places in Europe, in particular the Byzantine Empire, where the old capitalistic system was never replaced by medieval economy.

Besides, right from the first moment when the West began, largely under the influence of currents flowing from the Byzantium,² to awaken from the lethargy of primitive economy, old monopolistic speculations were reviving. We shall see later how they had been combated at the close of the eighth century by Charlemagne. His measures were modelled after the old unaltered Roman principles, which later were adopted in all Western European countries in the definite shape of Zeno's constitution. Thus the former situation in the sphere of combinations had been revived unchanged not only *actually* but also *in law*. Therefore one cannot speak of any interruption in the cartel movement as being due to the reversion to primitive economy.

There is also no gap between old and new cartels during the epoch of guild organizations. I shall show subsequently³ that the latter did not conflict with cartels, but on the contrary often made use of them. Moreover, guilds themselves were nothing else than another form of exactly the *same idea of a monopoly of the market* as regards crafts which in other spheres was realized by cartels.

To the historical interruption LIEFMANN⁴ also resorted in

¹ MURATORIUS, *Antiquitates Italicae medii aevi*, Mediolani, 1738-42, Vol. II, pp. 865 et seq. Dissertatio trigesima. *De mercatibus et mercatura saeculorum rudium*; BRENTANO, *Die Anfänge des modernen Kapitalismus*, München, 1916, pp. 21 et seq. and 87 et seq.

² DIEHL, *Études Byzantines*, Paris, 1905, p. 13: "Aussi, pour le monde entier, Byzance était la grande initiatrice: c'est par elle que l'Occident barbare a pris l'idée d'une vie plus élégante; c'est par elle que l'Orient slave est proprement né à la vie historique, et les Arabes mêmes, malgré leurs brillantes aptitudes, lui on dû quelque chose de la splendeur de Bagdad et de Cordone. Songez que le moyen âge entier a rêvé de Constantinople comme d'une ville de merveilles, entrevue dans un miroitement d'or."

³ E.g. cf. p. 327 et seq., post.

⁴ LIEFMANN, *Kartelle und Trusts*, Stuttgart, 1924, 6th ed., p. 11:

order to save the theory which he held in common with his forerunners (Kleinwächter, Schönlanck, etc.) on the modernity of the cartel movement, which Professor Strieder had shaken by proving that cartels had existed before the fourteenth century.¹ The cartels discovered by Strieder are, in spite of their advanced age, very much up to date and exactly the same as to-day's so that Liefmann had, against his own theory, to admit that they were not merely *rings*, but cartels. But in order to avoid withdrawing his previous claims, he added that all these cartels of old up to the middle of the nineteenth century have no connection with the modern movement, because in the meantime the principle of free competition had been carried out everywhere, and the movement of our times is simply a reaction against that principle and as such is a quite new phenomenon.

Liefmann is followed in the recent Italian literature by VITO,² who opposed in a similar way the just remarks of Strieder. According to Vito, one cannot put together old and modern

"Aber alle diese Kartelle früherer Jahrhunderte und ebenso die vereinzeltten Bildungen dieser Art in der ersten Hälfte des 19. Jahrhunderts stehen mit der modernen Kartellbewegung nicht in historischem Zusammenhang, denn inzwischen war das Prinzip der freien Konkurrenz überall zur Durchführung gelangt, und die heutige Kartellbewegung ist erst eine Reaktion gegen dieses Prinzip."

"... Und von diesem Standpunkt aus, als Gesamterscheinung, als Mittel gegen ein Übermass von Konkurrenz ist ja auch die Kartellbewegung eine ganz moderne Erscheinung." The same word by word in the last edition (8th ed. of 1930).

¹ Cf. p. 133 et seq., post.

² VITO, *I sindacati industriali*, Milano, 1930, pp. 45 et seq.: "Me se si ricerca la fisonomia di tali aggruppamenti di produttori e si confronta con quella degli attuali; se si indaga il clima economico-giuridico in cui essi nacquero ed operano con quello attuale, non si può fare a meno di notare che *manca tra gli uni e gli altri un rapporto di storica continuità*."

"... Il sindacato come mezzo di reazione alla libera concorrenza appartiene, adunque all'epoca moderna: i precedenti non potevano avere a base che momenti speculativi, nè più nè meno come i rings." The same in the 2nd ed. of 1932.

cartels, as there is no historical connection between them. They arose under different conditions, both economic and legal. The older are the outcome of speculative considerations, whereas the modern are a reaction against free competition. As regards the novelty of monopolies Vito accepts that which is current in the Italian literature, where the motivation only is sometimes different. In particular, PANTALEONI¹ claims that syndicates of to-day (cartels) originated economic conditions different from those out of which old monopolies arose, and that the former do not at all aim at a monopoly or monopolistic regulation of prices. Their object is solely the rationalization of production and reduction of costs. Hence it is that modern syndicates have nothing in common with the old forms, save the name.² The arguments adduced by Pantaleoni differ in principle from the current opinion, which attributes to modern cartels and trusts (syndicates) monopolistic tendencies.

With regard to this economico-historical interruption between the old and modern cartels, repeated so readily by many authors, it is characteristic that they cannot agree as to its time and cause. Martin Saint-Léon, who first put forward this argument, associated it with the exact date of February 2, 1791, when the abolition of guilds had destroyed the corporation system. Sombart and Lehnich fix it more or less conformably at the second half of the nineteenth century when, in opposition to the previous epochs, supply must have exceeded needs. The

¹ PANTALEONI, "Alcune osservazioni sui sindacati e sulle leghe," *Erotemi di Economia*, Bari, 1925, pp. 253 et seq.: "A mio avviso i sindacati non vogliono al giorno d'oggi costituire monopoli, non riescono a creare monopoli, non nascono da condizioni propizie alla formazione di monopoli, non influiscono sui prezzi a modo di monopoli."

² PANTALEONI, ut sup., pp. 342 et seq.: "... sindacati di altri tempi, sindacati che gli attuali *non hanno di comune che il nome*, salvo per quei sindacati, una infima minoranza, che sono ancora sopravvivenze de altri tempi. frammiste alle nuove formazioni."

Similarly CASSOLA, *Il rischio l'organizzazione dell'industria moderna*, Napoli, 1926, p. 13.

interruption is placed in the same period by Liefmann, Vito, and others, who, however, explain it by a reaction against a too fierce competition. In a quite different way Pantaleoni accounts for the gap between old and modern cartels: the present are not monopolies, whereas the old ones were. According to Isaya the interruption consists in the long ages of barter economy and the later guild system; the present forms of cartels began to develop at the close of the fifteenth and beginning of the sixteenth centuries, in the epoch of the so-called early capitalism (*Frühkapitalismus*), when the guild spirit began to make room for capitalistic ideas. That was the time from which all other supporters of the interruption idea most decidedly exclude the origin of the present cartel movement. Obviously the theory of a historic interruption is, even for its originators, not so very clear and indisputable.

In the cartel literature serious voices, which unreservedly link the history of the present cartel movement with the Roman monopolies, and allege the authority of Zeno's constitution, are rather an exception. Here has to be counted Professor RAMELLA. This Italian economist and jurist correctly points out that the article 419 of the "*Code penale*" of a hundred years ago, which is based on the constitution of Zeno, is in itself proof that the cartel phenomenon is not of recent origin, but that only its extraordinary development is new.¹ Similarly HUBER, when comparing modern cartels to the Roman monopolies, says that *solely the form* of the former dates from the time of the big industries and the keener competi-

¹ RAMELLA, *Trattato della proprietà industriale*, Roma, 1909, Vol. II, pp. 486 et seq.: "*Che il fenomeno non sia dell'oggi si argomenta pure dalle sanzioni dell'art. 419 Cod. pen. fr. d'un secolo fa sull'accaparramento; in Roma stessa poi una costituzione dell'imperatore Zenone de monopolis puniva gravamente quoi che avessero esercitato un monopolio, quale testo anzi servì di modello al Codice francese. Ciò che è nuovo invece è lo sviluppo straordinario di tali imprese, il cui enorme accrescimento costituisce una minaccia alla libertà del commercio e dell'industria.*" Similarly Professor BRUGI, *Rivista del diritto commerciale*, 1911, I, pp. 273 et seq.

tion due to them, but their nature has always remained the same.¹

This relation was indirectly confirmed by other writers, who state in a general way, without special reference to the anti-monopolistic legislation in Rome, that cartel organizations were not foreign to Antiquity and the Middle Ages. LORENZ VON STEIN was the first to observe, in 1889, that cartels are as old as is competition in commerce and industry; but generally one is not aware of it.² A few years later Professor STEINBACH³ expressed the same view, and in the English literature Professor HIRST justly states that it is difficult to find a time in the history of society when there were no monopolistic tendencies. Trusts and cartels are merely a recrudescence of older combinations. The names vary, but the main purpose remains the same: "to raise prices by eliminating competition."⁴ Professor Chastin plainly expressed the view that such forms of industrial and commercial organization as trusts and syndicates were known in Antiquity. Commencing with the corn trade, they gradually embraced different branches of trade.⁵ His opinion is shared

¹ HUBER, A., *Die Strafrechtliche Bekämpfung der Kartelle und Trusts*, Leipzig, 1918, pp. 2 and 12.

² LORENZ VON STEIN, in *Industrie*, Berlin, 1889, pp. 17 et seq.

³ STEINBACH, *Rechtsgeschäfte der wirtschaftlichen Organisation*, Wien, 1897, pp. 158 et seq. Idem, in *Der Staat und die modernen Privatmonopole*, Wien, 1903, p. 18.

⁴ HIRST, *Monopolies, Trusts and Kartells*, London, 1905, p. 15: "It is impossible to find a time in the history of society when rulers and their subjects have not sought—too often by unjust or violent means—for gains that arise from monopoly."

Also p. 105 et seq.: "Thus the modern Trust or Kartell is simply a recrudescence of older forms of monopolistic combination. The main purpose which has led to the formation of Trusts and Kartells is that which has led to their formation under other names from the earliest records of economic history."

"... They may talk of the economies of big undertakings; but what they are really after is, of course, to raise prices by eliminating competition."

⁵ CHASTIN, *Les trusts et les syndicats de producteurs*, Paris, 1909, p. 1: "*Les trusts ont une lointaine origine. L'antiquité n'a pas ignoré cette forme de l'organisation industrielle avec laquelle les corporations du moyen âge offrent une grande parenté. On peut suivre jusqu'à*

by Professor Kohler, who is renowned for his exceptional perspicacity. The ancient and later laws bear evidence that manufacturers always endeavoured to eliminate and suppress undesirable competition.¹

Unfortunately, none of the above voices could change the prevailing opinion, possibly because they aired their views in a too general way, and incidentally. Further, they did not prove the close connection, economic and legal, between the old and modern monopoly movements; neither, on the other hand, did they refute the arguments raised in defence of the opposite opinion. The current science of cartels and trusts passes over in silence the whole history of the old movement up to the middle of the nineteenth century as being outside its scope. On the contrary, the Roman legislation became the *exclusive basis* of all later laws against monopolies and the present laws against trusts and cartels. The model was the constitution of Zeno faithfully copied during many ages. From this constitution are descended all later legislation. I shall endeavour to prove this later on.

l'époque contemporaine la tradition des coalitions patronales s'exerçant dans les branches les plus diverses, depuis le commerce des grains et l'extraction des combustibles, produits de première nécessité, jusqu'à la fabrication des glaces, objets de luxe ou d'agrément."

P. 3: "*Les manœuvres des producteurs et des marchands en vue de restreindre la concurrence sont d'une origine très ancienne, probablement aussi ancienne que le commerce lui-même.*" Similarly JANNET, CL., ut sup., p. 1.

¹ KOHLER, *Der unlautere Wettbewerb*, Berlin, 1914, pp. 2 et seq., and in "Die Ideale im Recht," in *Archiv für bürgerliches Recht*, Berlin, 1891, Vol. V, pp. 161 et seq. In the latter he enumerates a number of anti-monopolistic laws to which he refers in the former, where he says on p. 2: "*Bestrebungen dieser Art sind nicht erst der modernen Zeit eigen; wir finden sie bereits im antiken Recht, und sie durchziehen das mittelalterliche Leben bis zur Neuzeit.* Bekannt sind sie vor allem durch die zahlreichen gesetzgeberischen Versuche, sie zu bekämpfen und zu unterdrücken. Wir finden solche bereits im Altertum; und das ganze Mittelalter und die späteren Jahrhunderte hindurch schildert uns die Gesetzgebung wie in einem Spiegel, dass die Gewerbetreibenden bemüht waren, Elemente, welche ihnen nicht dienstsam waren, vom Gewerbe auszuschliessen, ihnen das Gewerbetreiben abzuschneiden, den Betrieb lahm zu legen und das Leben zu verleiden."

CHAPTER III

The cartel movement and the anti-monopolistic legislation after the fall of the Roman Empire.—Capitularies of the Frankish kings Charlemagne and Louis the Pious.—The cartel agreement between Pisa and Luca in 1181.—Municipal statutes in the thirteenth century in Viterbo and Urbino.—The “constitutiones iuris metallici” of Wenceslas II.—The salt cartel of 1301.—The wax cartel, 1309.—Bankers’ cartels in the fourteenth century in Italy.—Anti-monopolistic municipal statutes of Florence and other Italian towns in the fourteenth and fifteenth centuries.—Analogous statutes in German towns between the thirteenth and fifteenth centuries.—Anti-monopolist ordinances of the French kings in the fourteenth and fifteenth centuries.—Cartel agreements of Flemish merchants in the fifteenth century.—English statutes against monopolies and cartels

THERE are but meagre historical sources relating to the economic life on the territories of the former Roman Empire and its neighbouring countries, during the centuries following immediately upon its decline. Some distinct traces, however, show that the movement monopolizing trade and industry not only did not wane, but on the contrary grew steadily. The capitularies of the Frankish kings Charlemagne and Louis the Pious contained, like the Greek and Roman legislation, prohibitions to buy up corn, wine, and other goods for the purpose of a later re-sale at exorbitant prices. Special attention is paid to the collective action of merchants in the form of various understandings aiming at a concentration of the distribution in their hands.¹ To prevent monopolistic selling

¹ *Caroli Magni et Ludovici Pii Christianiss. regum et imp. Francorum Capitula . . . ab Ansegiso Abbate et Benedicto Levita collecta*, lib. I, cap. 131: “Quicumque enim tempore messis vel vindemiae, non ex necessitate, sed propter cupiditatem comparat annonam aut vinum: verbi gratia, de duobus denariis comparat modium unum et servat

organizations (both of merchants and of producers) from advancing prices, especially of corn and other provisions, these were regulated by official rates.¹ The futility of this measure, proved long before in Rome, did not deter Frankish kings from its application.²

We find traces of the existence of cartel agreements in the *Spanish-Jewish* contracts of the tenth century as mentioned by Fuchs. Particularly there is quoted a characteristic agreement which bakers of a certain town made in order to avoid further losses caused by the production of bakers' wares considerably exceeding the local market requirements. Therefore the bakers bound themselves to sell their goods on certain days only.³ This was a typical *cartel agreement of producers*, restricting production and mutual competition. They endeavoured thereby to avoid further losses and to obtain in the market as favourable prices as possible for their produce.

A kind of a cartel agreement was made in 1181 between Pisa and Luca, two commercial centres of Italy. Those towns were exhausted by a prolonged competitive struggle and the general economic difficulties through which Italy was then passing in consequence of a raging famine and epidemic.⁴ By virtue of this agreement, which excluded mutual competition, the net profit of the numerous undertakings of those towns,

usque dum venundare possit contra denarios quatuor aut sex amplius hoc turpe lucrum dicimus. Si propter necessitatem hoc comparat, ut sibi habeat et aliis tribuat, negotium dicimus." *Capit. Caroli Magni* of the year 806, I, 454: ". . . Turpe lucrum exercent qui per varias conventiones lucrandi causa inhoneste res quaslibet congregare decertant."

¹ *Cap. Caroli Magni*, I, 132.

² STERN, *Der Höchstpreis*, München, 1923. In this precise work the author draws a historical parallel, and demonstrates the futility of the analogous price-control policy to-day.

³ FUCHS, in *Mitteilungen des Seminars für orientalische Sprachen*, Vol. XV, 2, p. 33, cited in Kohler's *Unl. Wettbew.*, ut sup., p. 3.

⁴ SCHAUBE, *Handelsgeschichte der romanischen Völker des Mittelmeergebietes bis zum Ende der Kreuzzüge*, München, 1906, pp. 650 et seq.

including the formerly competitive salt monopoly, was divided in equal parts between both towns. The legal character of this cartel is best represented by the developed type of the modern *community of interests* (*Interessengemeinschaft*).

Municipal statutes of the towns *Viterbo* and *Urbino*, preserved from the thirteenth century, contain directions for fishmongers, forbidding under penalty of heavy fines to join companies (*societas*) for the joint purchase and sale of fish.¹ These companies influenced prices in their own favour and were therefore forbidden. They are a clear type of the modern cartels *for joint purchase and joint sale* or of cartels based on price agreement.

In Bohemia the *Constitutiones iuris metallici* of WENCESLAS II (1283-1305) condemned monopolistic combinations of ore traders for increasing the price of ores.²

In 1301 a cartel was formed between the salt mines in Aigues-Mortes of KING PHILIP THE FAIR and those in Provence belonging to CHARLES II, King of Naples. This *earliest* known practical instance of a producers' cartel with centralized sale on a large scale does not differ from analogous cartels to-day. At the same time, it was the first example of an *international cartel*, which combined rival enterprises of two different states and was planned for the *international* market.³ More than six

¹ *Statute of the town Viterbo* of the year 1251: "*Venditores piscium non faciant societatem de piscibus comparandis aut vendendis . . .*" under penalty of 100 Solids. A similar decision is contained in the Statute of the town *Urbino* of about the same date. (Cited by KOHLER, *ut sup.*, p. 2.)

² ZYCHA, *Das böhmische Bergrecht des Mittelalters auf Grundlage des Bergrechts von Iglau*, Berlin, 1900, Vol. I, p. 171.

³ Information about this cartel is derived from the letter of King Charles II, of December 6, 1301, to the governor of Provence, urging the latter to form this cartel. This letter is preserved in the State Archives at Naples, and has been published by DAVIDSOHN in *Forschungen zur Geschichte von Florenz*, Berlin, 1901, Pt. III, No. 382. The likeness of this cartel to those of to-day has been first pointed out by Professor STRIEDER in *Studien zur Geschichte kapitalistischer Organisationsformen*, München, 1914, pp. 68 et seq.

hundred years before the official birthday of cartels of this kind!

Although the salt cartel was formed between fiscal enterprises, it owed its creation primarily to the private initiative of two banking firms of Florence which were leaseholders of the enterprises concerned. The salt mines of the French king were exploited by the banking house *Albizi Franzesi* and the salt mines of the Neapolitan king by the house of *Bardi*. In order to put up the price of salt, which had dropped owing to competition between the mines for markets, and thereby to augment considerably their gains, the lessees decided to come to an understanding between themselves rather than carry on the injurious contest as heretofore conducted. To the kings as the owners of the enterprises in question, they presented the scheme for the formation of a company for a joint disposal of salt from the mines of both parties at a uniform and higher price which would increase the royal incomes.¹ Owing to the generally felt want of ready money at the royal courts of that time, both kings agreed to the formation of a cartel forthwith. The governor of Provence was even hurried by his king.² In December 1301 the lessees of these mines actually formed a cartel in the name of their kings, the owners of the mines. Thus they conveniently rid themselves of any criminal responsibility for organizing a monopoly in face of the severe prohibitions.

This cartel, in accordance with its function as joint sales office, was called *societas communis venditionis*, or, alternately, *trattatus societatis*.³

The idea itself was not a novelty. Producers' combinations, replacing rival competition by a policy of agreements enabling the dictation of uniform prices and bringing about an increase in the incomes accruing from the enterprises, were known long

¹ Letter of the King of Naples, dated December 6, 1301: ". . . in qua societate communis venditionis eiusdem magna utilitas utriusque Curie sicut nobis est expositum procuratur." In another place in this letter the cartel is called *trattatus societatis*.

² Cf. note 3 on p. 133.

³ Cf. note 1 on p. 134.

before, more especially in connection with handicrafts, when they had existed from the earliest times. The old Indian codes *Kautilya* and *Yajñadvalkya* combated cartel unions of artisan-producers.¹ The salt cartel had materialized this idea in the mining industry, and, what is more significant still, in the shape of the perfected cartel as known to-day.

The salt cartel of 1301, being the most classical expression of this movement, throws valuable light upon the origin of old cartels. This cartel arose from the competition of its members, who came to realize the necessity of abandoning the competitive struggle in favour of mutual agreement in order to make their enterprises more remunerative. Had the demand for salt exceeded the supply at that time, salt producers would certainly have been able to dispose of their produce, even at higher prices. There would have been no need for such a far-reaching restriction of the economic and legal independence of productive enterprise, to which producers agree in an extremity only. Evidently the markets of these salt mines frequently overlapped; the mines were snatching away customers from one another and the whole salt production was not consumed: in other words, the supply exceeded the demand. The theory of Sombart and Lehnich, which tries to prove the reverse, building upon it the main and essential differences between modern and old cartels, failed in this most classical case. The earliest cartel on the scale of the modern production cartels known to us resembles the latter also as regards the causes of origin. Both originate in the very same competitive struggle for a market glutted by over-production which either diminishes the profitableness of the rival enterprises or frustrates its increase.

As far back as 1309 we find that there existed in Germany cartel agreements of Hansa merchants who were exporting wax to England. The date of the formation of this cartel is not known. The object was to protect its members on the English

¹ See p. 89 et seq.

market against the keen Russian competition, owing to which prices were falling, and to obtain better prices for their own wax.¹

In the first decades of the fourteenth century we meet with clear traces of the existence of cartel organizations between large Italian banking firms, particularly in Florence. They were a strong financial support for the Governments of Rome, Naples, France, and England, which owed to their credits the functioning of their state machinery. In return for these services the richest sources of income of the States, such as the salt royalties mentioned before and others, were let to these firms on lease.² Although the business of the Florentine bankers was then flourishing they made use of a cartel organization further to increase and stabilize their incomes.

Yver shows that the first bankers' cartel was formed in Florence about the year 1316, between the renowned banking houses of Bardi, Peruzzi, and Acciajuoli, which were joined in 1330 by a fourth house of Bonaccorsi.³ This cartel eliminated

¹ KUNZE, *Hanseakten aus England 1275 bis 1412*, Halle a.S., 1891, pp. 35 et seq. (Document No. 40 of 1309); STEIN, "Die deutsche Genossenschaft in Brügge und die Entstehung der deutschen Hanse," in *Hansische Geschichtsblätter*, 1908, pp. 430 et seq.

² YVER, *Le commerce et les marchands dans l'Italie méridionale au xiii^e et xiv^e siècle*, Paris, 1903; SCHAUBE, *Handelsgeschichte der romanischen Völker des Mittelmeergebietes bis zum Ende der Kreuzzüge*, München, 1906; KULISCHER, "Warenhändler und Geldanleihen im Mittelalter," *Ztschr. f. Volkswirtschaft, Sozialpolitik u. Verwaltung*, 1908, Vol. 17; MELTZING, *Das Bankhaus der Medici und seine Vorläufer*, Jena, 1906. In addition to an exhaustive historico-economic monograph of the *Medici* (pp. 92 et seq.) banking house, Meltzing gives an exact list of the most important Florentine banking companies, beginning with the earliest known (Scala, pp. 16-91); at the same time he points out their frequent co-operation.

³ YVER, *ut sup.*, pp. 302 et seq. The salt cartel of 1301 (the house of Bardi, who belonged to the cartel of bankers discovered by Yver, was also its member) is evidence that cartel agreements of Florentine bankers existed earlier than 1316. Yver does not mention the cartel of 1301 in his work; apparently he did not know of the letter of the Neapolitan King of December 6, 1301. The date of the bankers' cartel is indicated by him only approximately: ". . . il résulte que l'accord eut lieu vers l'année 1316" (p. 309).

the mutual competition of its members and rendered their credit policy towards kings and princes uniform. Unfortunately more particulars concerning this cartel are lacking. Most likely it was, as Scaccia proved, one of those banking cartels often met with at that time. Its members had to observe a fixed rate of interest on the loans they granted to kings and princes.¹ A faithful conception of the modern terms-fixing cartels of bankers (*Konditionskartelle*) which in the cartel literature is regarded as a creation of the last decades.²

Professor Daenell points out that among Flemish and Dutch merchants at the beginning of the fifteenth century there existed a strong tendency towards cartel agreements. In 1417, German merchants in Bruges complained to the Hansa that the Flemings *had fixed their prices of goods so that none of them could sell cheaper*.³ Agreements of this kind embraced a number of goods, thereby monopolizing trade and causing dearness. Despite the efforts of the Hansa to combat them, they were occurring again and again during the fifteenth century, especially among Flemish merchants. Daenell expressly states that these organizations were aimed at a perma-

¹ SCACCIA, *Tractatus de commerciis et cambio*, Frankfurt, 1648, p. 299, in the heading of Chap. X, "Campsores quomodo convenient de monopolio"—on p. 300, in par. 6: "... aliqui mercatores conveniunt, totam fori pecuniam accipere cambio, ut, foro ita restricto, pretium cambiorum augeant, eoque aucto, dent ipsi ad cambium eandem pecuniam cum maximo lucro."

In par. 7 on the same page: "... quando mercatores divites scientes, extare Principes, qui pro aliqua urgente necessitate quaerunt pecunias ad cambium, conveniunt de non dando illas, nisi pro tanto pretio, quod esset iniustum et excessum."

We learn of the existence of similar banking concerns among large German and Italian commercial firms in the sixteenth century from Professor EHRENBURG, *Das Zeitalter der Fugger*, Jena, 1912, Vol. I, pp. 399 et seq.

² LIEFMANN, in *Deutsche Wirtschafts-Ztg.*, Berlin, 1905, p. 66.

³ DAENELL, *Die Blütezeit der deutschen Hanse*, Berlin, 1906, Vol. II, p. 428: "Schon 1417 beschwerte sich das Brügger Kontor bei der Hanse, dass die Fläminger die Preise der Waren untereinander fest vereinbarten, so dass keiner sie billiger gebe."

nent and monopolistic control of the market. Thus these were not *ephemeral, transient speculations* of merchants, described inaccurately in the cartel literature as *rings* and opposed to cartels as something quite different.¹

Along with the growth of monopolistic cartel organizations, anti-monopolistic legislation developed in every country. This is paradoxical yet true. On the one hand, the cartel movement gradually expanded into newer and wider spheres, while on the other hand the anti-monopolistic legislation displayed its helplessness to cope with the situation. Prohibitions of monopolies based on the Roman constitution were over and over again repeated with the same ineffectiveness as in Rome.

The municipal law of Florence from the year 1322 to 1325 was like the constitution of Zeno—directed against all concurrence and understandings of merchants and artisans, and particularly against all price-cartels (*Preiskartelle*) and conditions-cartels (*Konditionskartelle*) against which it imposed heavy fines; further, all agreements of this kind were declared *ipso iure* void.² This decree reappears in the municipal Statutes of Florence in 1415.³

¹ E.g. LIEFMANN, *Kartelle u. Trusts*, Stuttgart, 1930, p. 20.

² "Stabilitum est quod nulla ars vel universitas aut membrum seu consules vel singulares homines alicuius artis civitatis vel districtus florent. possit audeat vel presumat facere vel fieri *facere seu servari facere clam seu palam conspirationem aliquam seu conventionem posturam pactum monopolium vel doghanam de rebus vel super rebus aut negotiationibus ad artem suam vel alterius ullo modo pertinentibus certo modo vel forma, seu pretio vendendis vele mendis aut aliquo modo agendis vel contrahendis, quin libere possit et liceat cuilibet emere ac vendere et agere, prout voluerit et poterit melius et convenerit, cum secum contrahente vel agente, de rebus et negotiationibus antedictis. Et si contra predicta vel aliquid eorum veniretur vel fieret ullo modo directe vel per obliquum tacite vel expresse, non valeat nec teneat ipso iure; et quod pro qualibet vice qua contra factum vel ventum fuerit condemnuetur ars membrum vel universitas artis contrahentis in libr. millē flor. parvorum." (KÖHLER, *Unlaut. Wettbew.*, ut sup., pp. 2 et seq.)*

³ Municipal Statutes of Florence, of the year 1415 (III, 87): "*Homines . . . non possint . . . facere . . . conspirationem aliquam seu*

Analogous prohibitions were contained in the statutes of many other Italian towns, for instance in those of *Montefeltro* in 1384 and *Teramo* in 1440.¹ A Statute of Pisa in 1343 was especially directed against monopolistic agreements of artisans.²

In the same way German positive law responded to all monopolistic organizations. *Polizeiverordnungen* of *Nuremberg* in the thirteenth and fourteenth centuries forbade, under penalty of severe fines, the organization of *Fürkauf* with regard to victuals.³ *Fürkauf* tallied in principle with the Roman *monopolium*, beside which it appeared in the German anti-monopolistic legislation of that time and later. It applied to all those trade monopolies of merchants which monopolized a market through buying up the whole stock of a given merchandise. Hence the name *Fürkauf*, later used alternatively with *Aufkauf*. Such a buying up, often periodically repeated, was as a rule organized by companies, rarely by individuals, owing to the large capitals required and the risk connected with it. Subsequently I shall

conventionem, posturam, pactum vel monopolium aut doganam super aut de rebus aut negotiationibus . . . certo modo vel forma seu pretio vendendis vel emendis aut aliquo modo agendis vel contrahendis, quin libere possit et liceat cuilibet emere, vendere et agere prout voluerit. . . . Quod in contrarium fieret non valeat ipso iure."

" . . . Omnes promissiones, conventiones, posturae, monopolia et pacta et obligationes . . . et instrumenta inde confecta sint cassa et vana" (1415, III b, 21). (KÖHLER, *Unlaut. Wettb.*, ut sup., p. 3.)

¹ Statutes of the towns *Montefeltro* (1384, II, 33) and *Teramo* (1440, IV, 45), cited by Köhler, ut sup., p. 3. According to the Statute of *Teramo*, anyone was fined who *de quacumque arte vel mercantia sive de quibuscumque rebus audeat facere aliquod monopolium sive posturam!*

² *Breve dell'ordine del mare della città di Pisa* of the year 1343: "Non si possa nè debbia fare . . . alcuno monupolio . . . di lavorare u di non lavorare u vero per cento pregio tanto." (Quoted by Strieder, ut sup., p. 187.)

³ BAADER, "Nürnberger Polizeiverordnungen aus dem XIII.-XV. Jahrhundert," in *Bibliothek des literarischen Vereins in Stuttgart*, 1861, pp. 191 et seq. (Victualien-Polizei): ". . . Man verbeutet allen *fürkauf* und allen pfragenkauf allen gesten, allen Juden, allen pfragen und allen futerern. . . . Ez sol auch nieman dehain corn kaufen wan dez er bedarf in seinem haus."

find occasion to show by numerous instances that *Fürkauf* was the most frequently applied *means* leading to a systematic monopolization of the market, and not a sporadic speculation, a *speculative ring* as is commonly believed.¹

Rules analogous to those in Nuremberg were contained in the municipal Statutes of Cologne in 1348 and other German towns between the thirteenth and fifteenth centuries.²

Conditions in France developed exactly in the same way. A strong monopolistic movement embraced the trades in various articles of everyday use, as in Rome and other countries, in particular the corn trade, which, being intended for mass sale, was also here most highly developed. Hence competition was naturally keener here than in other trades, not having such a large turnover. The closer the competition the more susceptible was the ground for monopolies in one form or other, which only afforded a relief for the competitors from this vexing, uncertain, and often obnoxious struggle. Numerous ordinances (*ordonnances*) issued by the French kings in the fourteenth and fifteenth centuries were directed in the first instance against all kinds of corn monopolies, thus linking up with the analogous Roman legislation and with the statutes of the Frankish kings mentioned before.³

DELAMARE points out the monopolistic tendencies in the corn trade in France at that time, and compares them unreservedly with those prevailing in ancient Greece and Rome,

¹ E.g. KEEL, *Industrielle u. kommerzielle Ringe u. Kartelle*, ut sup., p. 63.

² KOHLER, *Unlaut. Wettb.*, ut sup., p. 3. The Statute, which he cites, was particularly directed against monopolistic organizations of butchers of Cologne.

³ *Ordonnances of the Kings*: Philip IV of 1305, John of 1350 and 1355, Charles IV of 1415, Charles VII of 1439. DELAMARE quotes them in *Traité de la Police de France touchant le commerce des Grains* (Livre V, Titre V, "De la Police de France touchant le commerce des Grains"). Delamare cites also several analogous anti-monopolistic *Ordonnances du Prevost de Paris* and *Arrests du Parlement*, dating from the same time

as two identical phenomena. He also emphasizes as most important the same tendency of the Roman and French monopolies to *restrict the superabundance* of corn in order to intensify the demand for it. Only then are monopolies able to dictate prices in accordance with their own will. These two points: a restriction of supply and discretionary dictation of prices Delamare considers as the most essential features of the Roman and French monopoly organizations.¹ There is no mention that corn monopolies owed their existence to the demand exceeding the supply, or to an insufficient covering of requirements, as is maintained by the Sombart-Lehnich theory. Delamare, who was nearer to these conditions by several centuries than Sombart and Lehnich, and who to a certain extent saw it with his own eyes in France,² stated the reverse of this theory.

¹ DELAMARE, ut sup., pp. 687 et seq. (Titre IV, "De la Police des Romains touchant le Commerce des Grains") represents conditions prevailing in Rome and the Roman policy with regard to corn monopolies; he then compares these with the situation in France.

On p. 711 he says: "Cette mauvaise foy (i.e. foi) à l'égard des Marchands de grains, consiste dans cet unique point, d'en *cacher l'abondance*. Ils sont persuadez que cette rareté ou disette apparente les feront rechercher avec empressement; qu'alors faisant paroistre peu à peu qu'ils en ont en reserve, ils y mettront tel prix qu'ils jugeront a propos, et qui n'a ordinairement d'autres bornes que celles de leur avarice insatiable. Ce vice a toujours esté en abomination, et ceux qui le commettent sont encore aujourd'huy comme autrefois l'objet de la haine publique."

"... Le Romains, comme il vient d'estre observé, le rangeoient sous la categorie des crimes extraordinaires, ils comptoient ceux qui en estoient coupables au nombre des ennemis de l'Estat, et ils armerent toute la severité des Loix pour les punir.

"Cette avidité de gagner aux dépens de sa conscience et du repos public, ne commença de paroistre en France que sous le Regne de Charlemagne, l'an 806, elle fut aussi-tost condamnée comme un gain infame, *turpe lucrum*."

² DELAMARE, ut sup., p. 704: "*D'autres monopoles des Marchands de blé parurent dans la suite pour en faire augmenter le prix . . . ils surent en profiter, et par leur mauvaises pratiques ils portèrent le blé et les autres grains à un prix excessif*. Le Procureur Général du Roy estant

Despite numerous prohibitions in statutes and orders, it spread in France at that time, perhaps even wider than in other countries.¹ The fact that France was then, as Delamare states, one of the most fertile countries of Europe, did not prevent this state of affairs.²

These monopolies as well as older monopolies of corn and other products of first necessity in the Frankish and Roman states are pointed out by Professor CHASTIN as one of the proofs that modern trusts and syndicates were known in ancient times. All these coalitions tended or tend to the same goal: to maintain or increase the gain of industry by a restriction of competition. Their shape and form only changed in various periods of history and in different industries.³

Chastin proves, by means of documents from the municipal archives of the town of *Nevers*, that there, and undoubtedly also in other towns, as far back as the fifteenth century, existed endeavours to form *financial syndicates*.⁴ Unfortunately, further information about them is lacking. Similar organization

informé de cette *calamité publique*, en fit ses remontrances au Parlement, et par *Arrest du 12^e Decembre*, 1416, rendu en la presence du Prevost des Marchands et des Echevins, representans le Corps des Citoyens et implorans le secours de cet auguste Tribunal."

¹ DELAMARE, *ut sup.*, p. 703.

² Delamare shows at the same time that a similar situation existed in France in the sixteenth and seventeenth centuries, i.e. in his days. I shall discuss this subsequently on p. 186 et seq.

³ CHASTIN, *Les trusts et les syndicats de producteurs*, Paris, 1909, pp. i et seq.: "Les trusts ont une lointaine origine. L'antiquité n'a pas ignoré cette forme de l'organisation industrielle. . . . On peut suivre jusqu'à l'époque contemporaine la tradition des coalitions patronales s'exerçant dans les branches les plus diverses, depuis *le commerce des grains et l'extraction des combustibles, produits de première nécessité, jusqu'à la fabrication des glaces, objets de luxe ou d'agrément.*"

" . . . Toutes ces sortes de coalitions poursuivent en réalité le même but, maintien ou relèvement des bénéfices industriels par la restriction de la concurrence. Les différences de formes s'expliquent soit par l'époque de leur apparition, soit par la nature même de l'industrie."

⁴ CHASTIN, *ut sup.*, p. 4: "Il y à Nevers et sans doute dans d'autres villes, au XV siècle, des tentatives d'organisation de syndicats financiers."

in Italian towns, and particularly in Florence, are known to us as far back as the beginning of the fourteenth century.¹

The principles of the Roman anti-monopolistic legislation were applied widely also by the *English Common Law*, which from the earliest times fought monopolies of every description. The original monopoly conception of Aristotle was revived here in its classical form more plainly than anywhere else. *All* monopolies without exception, even those granted by the king, were considered contrary to the law, because they restricted the personal freedom of the individual, secured to every subject by the *Magna Charta* (Cap. XXIX). In the later English legal opinion, therefore, every monopoly was not only contrary to the principles of Common Law, but also infringed the provisions of the Charter of 1215. As such it was void and punishable.² In particular it violated the provisions of Chapter XXX, in addition to those of Chapter XXIX, which dealt with the liberties of Englishmen at large. The former guaranteed to all merchants unrestricted freedom in the execution of their trade.

On the above principles COKE based his definition of a monopoly, which has been generally accepted in the earlier

¹ Cf. ante, p. 136 et seq.

² COKE, *Institutes of the Laws of England*, the second part, London, 1642, p. 45. *Magna Charta*, cap. xxix: "Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis. . . ." Commenting (on p. 47) upon the idea *libertatibus*, Coke states: "*Generally all monopolies are against this great Charter, because they are against the liberty and the freedom of the subject, and against the law of the Land.*" According to Coke, this follows also from the provision contained in Chapter XXX of the *Great Charter*, which grants all merchants full and unrestricted freedom in the exercise of their trade (p. 57). Also in third part, p. 181: ". . . all grants of monopolies are against the ancient and fundamentall laws of this Kingdome."

" . . . Whatsoever offence is contrary to the ancient and fundamentall laws of the Realm, is punishable by law; but the use of a monopoly is contrary to the ancient and fundamentall laws of the Realm, therefore the use of a monopoly is punishable by law."

and later English science and practice.¹ To this definition of Coke the Supreme Court of the United States of America referred in recent times in its famous decision of May 15, 1911, against the Standard Oil Company of New Jersey, the most prominent representative of the cartel movement in America to-day.² What a magnificent and clear proof of the continuation of the old monopoly organizations in the modern trusts and cartels!

Coke regards all monopolies as parallel and economically identical, no matter whether they were formed by *individuals* (*person*) or *companies* (*persons*), whether granted by the authority or originated *otherwise*. By the latter he understands all other possible forms of monopolies which are not based on a royal grant, that is to say which are strictly private, *de facto* monopolies.³ All consist in an exclusive right to trade in, produce, work, or to make use of a thing whereby other people suffer a restriction of their rights of freedom.

Coke remarked wittily that monopolies in England *were ever* without law, but never without friends.⁴ A long series of anti-monopolistic statutes since the days of the Great Charter

¹ COKE, third part, p. 181: "A monopoly is an institution, or allowance by the King, by his Grant, Commission, or otherwise, to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedom, or liberty that they had before, or hindered in their lawfull trade." Similarly BLACKSTONE, *Commentaries on Laws of England*, London, 1813, Vol. IV, p. 145, and many other writers.

² *Federal Anti-Trust Decisions, Cases Decided in United States Courts*, Vol. IV, Washington, 1912, p. 122. I shall revert to this decision later on, p. 360 et seq.

³ COKE, ut sup., p. 182: "These words (or otherwise) are of a large extent . . . any of them are declared to be altogether contrary to the laws of this Realm. This Act herein, and in the residue thereof, is forcibly and vehemently penned for the suppression of all monopolies: for monopolies in times past were ever without law, but never without friends."

⁴ Cf. the preceding quotation on this page.

demonstrate the truth of this. They reflect the unwritten history of the old monopoly movement in England. Starting with corn and other provisions, gradually newer and newer trades and industries became the object of monopoly organizations. The severe legislation could not arrest their victorious march. A copy, or, rather, a natural duplicate of all that happened on the Continent.

The first forms of the monopoly movement are here, as on the Continent, very simple. The earliest English anti-monopolistic statutes were directed against *forestallors* (the old German *Kauf*, *Aufkauf*, and *Fürkauf*) of victuals and other goods. Indirectly official price-lists of victuals endeavoured to prevent such purchases; transgression of these rates was meted with very severe penalties.

In 1266, a Statute of Henry III set out prices of bread and ale in detail, laying special stress on the fact that these prices should correspond to those of corn, which undoubtedly were fixed before in assizes.¹ Another contemporary Statute of Henry III provided criminal sanctions for the non-observance of those rates, such as amercements, pillory, and tumbrel.² This Statute was directed likewise against *forestallors* of all goods.³

¹ *The Statute intituled, Assisa Panis et Cervisie*, made Anno 51 Hen. III, Stat. 1, and A.D. 1266.

"*The Prices of Bread and Ale shall be according to the Prices of Corn.*"

² *A Statute of the Pillory and Tumbrel, and of the Assise of Bread and Ale*, made Anno 51 Hen. III, Stat. 6, and A.D. 1266.

"If a Baker or a Brewer be convict, because he hath not observed the *Assise* of Bread and Ale, the first, second, and third time, he shall be *amerced* according to his Offence if it be not over grievous; (2) but if the Offence be grievous and often, and will not be corrected, then he shall suffer Punishment of the Body, that is to wit, a Baker to the *Pillory*, and a Brewer to the *Tumbrel*, or some other Correction."

³ Ut sup., par. III (5): "And also *Forestallors*, that buy any thing afore the due and accustomed Hour, against the good State and Weal of the Town Market, or that pass out of the Town to meet

The above provisions were renewed by a Statute at the beginning of the fourteenth century (the exact date of which is unknown)¹ which added to the criminal sanctions against *forestallers* monopolizing the market and aiming at a rise in prices of goods. The Statute brands them as oppressors of the poor and the community at large, as enemies of the whole country.² Besides fines, confiscation of goods, pillory, and imprisonment, banishment from the town was the punishment upon the commitment of the crime for the fourth time. All accomplices had to suffer the same punishments as the principal.³

Likewise in 1349 a statute of Edward III made provisions that *artisans* and *labourers* taking for their products or labour prices higher than those which were customary, should be liable to imprisonment.⁴ This Statute was directed once again

such things as come to the Market, being out of the Town, to the intent that they may sell the same in the Town more dear unto Regrators, that utter it more dear than they would that brought it in case they had come to the Town or Market."

¹ HAWKINS, *The Statutes at Large from Magna Charta . . .*, London, 1735, Vol. I, p. 180. Certain Statutes made during the Reigns of King Henry III, King Edward I, or King Edward II, but uncertain when, or in which of their times (i.e. in any case before the year 1327).

"An Ordinance for Bakers, Brewers, and for other Victuallers; and for Ells, Bushels, and Forestallers."

² Ut sup., Cap. X: "But especially be it commanded on the behalf of our Lord the King, that *no Forestaller be suffered to dwell in any Town*, which is an open Oppressory of poor people and of all the Commonalty, and an Enemy of the whole Shire and Country, which for Greediness of his private Gain doth prevent others in buying Grain, Fish, Herrin, or any other thing to be sold, coming by Land or Water, oppressing the Poor, and deceiving the Rich, which carrieth away such things, *intending to sell them more dear.*"

³ Ut sup., Cap. X (6): ". . . *And this Judgement shall be given upon all manner of Forestallers, and likewise upon them that have given them Counsel, Help, or Favour.*"

⁴ *The Statute of Labourers*, made 23 Edw. III and A.D. 1349, C.l.p. V: "If any Artificer or Workman take more Wages than were wont to be paid, he shall be committed to the Gaol."

against exorbitant prices of all provisions, stressing for the first time not the observance of the existing rates, but that the prices should be reasonable.¹ Legal sanction was rendered more severe: a merchant who overcharged had, apart from the old penalties, to pay to the injured party damages double the sum he received.² All municipal and judicial authorities were especially entrusted with the prosecution of the offenders.

Penal provisions against forestallers must have had, in spite of their severity, but little effect, as they were repeated several times within short intervals.³ Among other things, monopoly organizations of merchants must have been frequent with regard to imported goods, especially French wines. Thus the Statute of Edward III in 1350,⁴ and also a special Statute of 1353,⁵ forbade as *felony* to buy up and to *ingross* goods before their unloading into the store-houses in the port.

The Statute of 1353 dealt in particular with the cartel

¹ *The Statute of Labourers*, Cap. VI (*Victuals shall be sold at reasonable Prices*). Item, That Butchers, Fishmongers, Regrators, Hostellers, Brewers, Bakers, Pulters, and all other Sellers of all manner of Victual, shall be bound to sell the same Victual for a reasonable Price, having respect to the Price that such Victual be sold at in the Places adjoining, so that the same sellers have moderate Gains, and not excessive reasonably to be required according to the Distance of the Place from whence the said Victuals be carried.

² Ut sup., Cap. VI (2): "And if any sell such Victuals in any other manner, and thereof be convict in the manner and form aforesaid, he shall pay the double of the same that he so received, to the Party damnified, or, in default of him, to any other that will pursue in this behalf . . . and nevertheless towards us they shall be grievously punished."

³ Statute made Anno 25 Edw. III, Stat. 4, and A.D. 1350, Cap. III (*The Penalty of him that doth forestall Wares, Merchandise, or Victual*) and other which are cited in the following notes.

⁴ Statute made Anno 25 Edw. III, Stat. 7, and A.D. 1350, Cap. V (*It shall be Felony to forestall or ingross Gascoign Wine*). This Statute was repeated in Statute 38 Edw. III, I and III, A.D. 1363.

⁵ *A Statute of the Staple*, made Anno 27 Edw. III, Stat. 2, and A.D. 1353, Cap. XI, *The Penalty for forestalling of Merchandise before they come to the Staple*. This Statute had reference to "Wines and other Wares or Merchandises."

organization of monopolists, forbidding clandestine *confederacy* and *conspiracy* for the carrying out of the policy.¹ And also here we have to do not with sporadic usurian speculations of unorganized individuals, as is generally held with regard to old monopolies, which are in this respect opposed to modern cartels. Thus primitive methods of buying up could not, even with a competition as it was then, secure a stable position even on the local market, which mattered most at that time. To gain a monopoly on a local market a common, organized action, in other words a *cartel* of the most powerful competitors, often became a necessity.

The fact that competitors acted in agreement when engrossing the market, is expressed in the English anti-monopolistic legislation by the significant term *conspiracy*. This word was first used in this connection in the Statute of 1353, and reappears continually in the anti-monopolistic statutes. From here it passes over to the American anti-trust legislation, being thus a continuation of the old monopoly prohibitions.

Besides the old *forestall* there appears for the first time in the Statute of 1350 the new term, *ingross*, which denoted the same old monopolization of the market. It might appear from the contraposition "*forestall or ingross*" that the latter expression referred to some new method of monopolization. But in fact it was merely a second, inseparable part of the same *forestall* operation, and its natural, direct, and immediate effect, which has been emphasized there. *Ingross* and *ingrossing* are continually repeated in the later English anti-monopolistic legislation.

Again, in the Statute of 1353 the name "*conspiracy*" was

¹ Cap. XXV of the Statute of 1353. "Hem we have ordained and established, That no Merchant or other shall make *Confederacy, Conspiracy, Coin, Imagination, or Murmur, or evil Device* in any point that may turn to the Impeachment, Disturbance, Defeating or Decay of the said *Staples*, or of any thing that to them pertaineth, or may pertain."

used for the first time with reference to monopolists' organizations, and since then it never has been dissociated from them, as well as their modern *trust* form.

Another Statute of Edward III in 1350,¹ as the one preceding it in 1349,² was against similar tendencies of agricultural labourers and artisans aiming at an augmentation of their gains. The Statute set maximum remunerations which could not be transgressed under pain of punishment. Particularly the Statute ordered that shoes and boots should be sold at the price which prevailed five years before. It is further stated there that artisans pledged themselves under oath to practise the same crafts as they did five years before.

In 1363 Edward III again took measures against *ingrossing* goods to create a rise in their prices. At the same time an interesting attempt was made to weaken the growing influence of merchants on the market. The Statute of 1363 did not allow merchants to trade in more than one kind of goods.³ It was intended to prevent thereby a development of large storehouses which could easily share the balance of forces in the competitive struggle and which, owing to the ascendancy they gained over small, individual merchants, were able to monopolize the market. This regulation demonstrates that the elementary idea of the modern competition between large stores and small merchants of various trades for the local

¹ *A Statute of Labourers*, made Anno 25 Edw. III, Stat. I, and A.D. 1350. Cap. I regulated "*The Year and Day's Wages of Servants and Labourers in Husbandry*," Cap. III "*The several Wages of several sorts of Artificers and Labourers*."

Cap. IV ordains that "*Shoes and Boots shall be sold as they were the 20th Year of King Edward the Third*."

"*Artificers sworn to use their Crafts as they did in the 20th Year of the same King*."

Cap. V provided punitive sanctions for the infringement of this Statute.

² Cf. ante, p. 146, note 4.

³ Statutes made at Westminster, Anno 37 Edw. III and A.D. 1363, Cap. V, "*Merchants shall not ingross Merchandises to inhance the Prices of them, nor use but one sort of Merchandises*."

market was not foreign to English towns in the middle of the fourteenth century. But it was soon found that such a far-reaching intervention on behalf of open competition and full industrial liberty of the individual leads to his far greater restraint and contravenes clearly the principles of the Great Charter. Thus this unconstitutional restriction of the right to freedom of trade had been abrogated in the same year, 1363.¹

Similar restrictions have for the same reason been also introduced into the realm of handicrafts. The Statute of Edward III, in 1363, mentioned above, allowed artisans to pursue *only one craft*.² This restriction, however, had a more lasting existence. It proves how fierce was the competition in handicrafts in those days in England. The State had to step in lest people should snatch from one another and cumulate workshops and earnings; evidently there was no room to set up new workshops. Keeping to the same policy Richard II, in the year 1389, forbade shoemakers to follow the trade of tanners by a Statute, and vice versa tanners that of shoemakers, though these crafts were closely connected at that time.³ This restriction was not repealed until 1403;⁴ the general

¹ Statutes made at Westminster, Anno 38 Edw. III, Stat. I and A.D. 1363, Cap. II, "*Any Merchant may use more Merchandises than one, notwithstanding the Statue of 37 Edw. II, c. 5.*"

"Hem, to that which was ordained at the last Parliament, . . . that no English Merchant should use but one Merchandise, it is ordained, That all people shall be as free as they were at all times before the said Ordinance, and namely as they were in the time of the King's Grandfather, and his other good Progenitors. And that all Merchants, as well Aliens as Denizens, may sell and buy all manner of Merchandises. . . ."

² Statute made at Westminster, Anno 37 Edw. III, A.D. 1363, Cap. VI, "*Handicraftsmen shall use but one Mystery.*"

³ Statutes made at Westminster, Anno 13 Rich. II, Stat. I, and A.D. 1389, Cap. XII, "*No Shoemaker shall be a Tanner, nor Tanner a Shoemaker.*"

⁴ Statutes made at Westminster, Anno 4 Henrici IV, and A.D. 1402, Cap. XXXV, "*Shoemakers and Cordwainers may tan Leather, notwithstanding the Statute of 13 Rich. II, Stat. I, Cap. 12.*" (This Statute—Cap. XXXV—was issued in the following year, i.e. in 1403, anno quinto Henrici IV.)

prohibition of cumulating crafts of 1363 remained, however, still in force.

A number of statutes show how much the English Government was concerned with the development and enrichment of the home industry, protecting it from foreign competition. The Statute of Edward III forbade the wearing of clothes other than home-made; apparel made abroad was not allowed to enter England.¹ This bears striking resemblance to the protective policy of England to-day. Recently, for instance, when high tariffs almost barred out the importation of German eau-de-Cologne into England, a Cologne factory was allowed to set up a branch near London to supply the English market.

A Statute of Richard II in 1390 ordered English merchants to make use of English ships only² for the transportation of their goods; and a Statute of Edward IV in 1463 protected English agriculture, and the importation of corn into England was prohibited until the low price of home-grown corn, so harmful for the home production, rose on the English market to a certain figure.³ This Statute is valuable proof of the

¹ Statutes made at Westminster, 27 Septembris, Anno II Edward III, and A.D. 1537, Cap. II, "*None shall wear any Cloth, but such as is made in England.*"

Cap. III, "*No Clothes made beyond the Seas shall be brought into the King's Dominions.*"

Cap. V, "*Clothworkers may come into the King's Dominions and have sufficient Liberties.*"

² Statutes made at Westminster, Anno 14 Rich. II and A.D. 1390, Cap. VI, "*Item, That all Merchants of the Realm of England shall freight in the said Realm the Ships of the said Realm, and not strange Ships.*"

³ Statutes made at Westminster, Anno 3 Edwardi IV and A.D. 1463, Cap. II, "*A Restraint of bringing Corn into this Realm, until it shall exceed certain Prices.*"

"Whereas the labourers and occupiers of husbandry within this realm of England be daily grievously endamaged by bringing of corn not of the growing of this realm in at a low price: our redoubted sovereign lord the King considering the premisses, . . . hath ordained and established, That no person from the feast of Saint John the Baptist next coming shall bring or convey into any place or port of this realm,

assertion that the buying up of corn for monopolistic purposes, which was so severely prosecuted, was in England, too, not the result of a scarcity of corn on the market, though this generally serves as explanation of the origin of old corn monopolies, but on the contrary was the consequence of its superabundance.

Similar protective statutes were not absent also in other fields of English industry at that time.

by way of merchandise, nor otherwise, any wheat, rye, or barley which is not of the growing of this land, or of any isle pertaining to the same, or of the growing of the country of Ireland or Wales, at any time that the quarter of wheat doth not exceed the price of six shillings eight pence. The quarter of rye doth not exceed the price of four shillings. And the quarter of barley three shillings of lawful money of England. . . .”

CHAPTER IV

Monopolistic tendencies in the alum industry in the fifteenth century.—The alum cartel of 1470.—Its origin.—Its internal structure.—Its relation to outsiders.—Strieder's theory on the fiscal nature of the earliest cartels.—The copper cartel of 1498.—Guilds

IMMEDIATELY before the discovery of rich alum beds in the Papal State near the small town of Tolfa in the year 1461, both the European and the world market of alum was under the undivided control of the Turks, who at that time possessed the richest mines, situated mainly in Asia. This monopoly was exploited on the European markets by wealthy Italian firms, which paid high rent for it to the Sultan. Nevertheless, it was still profitable for the Italian merchants owing to the wide use of alum in the cloth dyeing and leather tanning industries.¹

With the appearance of the competition of Papal alum in 1461 the situation began to change. Pope Pius II let the exploitation of the mine in Tolfa out on lease to a private trading company, the so-called "*Societas Aluminum*," reserving for it the monopoly of the alum trade within the Papal State. In 1466, when the lease was renewed, the banking house of the *Medici* entered into partnership with it. In order to strengthen the position of the company in the competition with Turkish alum on the European markets, the Pope undertook in the contract to officially condemn the latter before the Christian world as heathen and to prohibit Christians to

¹ HEYD, *Histoire du commerce du Levant ou moyen-âge*, Leipzig, 1885/86 (2 vols.); ZIPPEL, "L'allume di Tolfa e il suo commercio," in *Archivio della R. Società Romana di Storia Patria*, Roma, 1907, Vol. XXX, pp. 11 et seq. and 34; GOTTLOB, *Aus der Camera apostolica des 15. Jahrhunderts*, Innsbruck, 1889; STRIEDER, *Studien zur Geschichte Kapitalistischer Organisationsformen*, ut sup., pp. 168 et seq.

traffic in it. The Pope also conferred on the monopoly company the right to intercept ships carrying Turkish alum and to confiscate the cargo. By virtue of the contract two-thirds of the quantity seized was forfeited to the Pope and one-third to the company. In the same proportion the cost of the equipment of the chief who protected the export of the Papal alum was borne by the Pope and the company.¹

The *Societas aluminum* tried at the same time to secure a monopolistic position on the main markets of Europe by making cartel agreements with firms trading in alum, which monopolized its supply on the various markets. These agreements can be summed up in the right of *exclusive* supply and a stipulation of boycott for Turkish alum. In this way Papal alum had actually secured a monopolistic position on the important Venetian market, owing to the agreement concluded with the Italian firm *Bartolomeo Giorgio*, at the beginning of the year 1469. This firm had gained not only the Venetian market, but also those of Lombardy, Southern Germany, and partly Austria. The contract determined exactly the price and the quality of alum which the *Societas aluminum* had to deliver every year to the firm of Bartolomeo Giorgio. The firm pledged itself to exclude the competitive *Turkish* article from the market. A similar monopoly was temporarily secured by the same company in several other countries, more especially in Spain, Burgundy, and Flanders. The *Societas aluminum* and the See of Rome sought in vain to obtain a similar monopoly on the English market.²

Such a perfectly organized Papal monopoly of alum was strikingly inconsistent with the anti-monopolistic teachings of the Roman Church at that time. It was, however, excused

¹ ZIPPEL, ut sup., pp. 405 et seq., gives an exact abstract of this monopoly-contract and cites the more important passages of it from the *Depositaria Generale della crociata*, 1464-1475, *Archivio di Stato Roma*. This is discussed in more detail by other writers, cited on p. 153, note 1.

² GOTTLÖB, ut sup., pp. 297 et seq.

according to the principle that "*the end justifies the means*" by the necessity of financing both the crusades against the Turks and the Husite wars.¹ The whole net profit which the monopoly yielded to the Pope—in the seventies of the fifteenth century it was calculated at one hundred thousand ducats per annum—had to be used to defray the cost of these wars.²

Having successfully dealt with the competition of Turkish alum, the *Societas aluminum* had only one dangerous competitor left on the European markets and that was the old-established and thriving alum mine on the island of *Ischia*.³ It was a royalty of Ferdinand, King of Naples, and was, like the rival Papal mine, exploited by private leaseholders. As the forces were about equal, the struggle became particularly fierce, but at the same time hopeless for both sides. Neither of the parties could utterly win or lose and the fight was only to the detriment of both. The growing production of both mines made the contest for an expansion of the market still more acute and brought about the usual further decline in the price. An agreement became an urgent necessity and was ultimately reached.

On June 11, 1470, the Pope Paul II and King Ferdinand of Naples, as owners of the competing mines, made a most up-to-date cartel agreement. The mines remained in the leasehold of the private companies which exploited them further and controlled their trade on the European markets. In a written contract, which was first made for the span of twenty-five years, the parties stated quite frankly that the purpose of this agreement was to keep the price of alum as high as possible, as it was declining owing to *mutual competition* and *excessive supply*. ("Ut per concursum et

¹ GOTTLOB, *ut sup.*, pp. 286 et seq.

² GOTTLOB, *ut sup.*, pp. 287 et seq.

³ ZIPPEN, "L'allume di Tolfa e il suo commercio," in *Archivio della R. Società Romano di Storia Patria*, Rome, 1907, Vol. XXX, pp. 11 et seq., and 34 et seq.; GOTTLOB, *Ausder Camera apostolica*, *ut sup.*, p. 296.

habundantiam aluminis pretium utriusque impediretur et vilesceret.”¹

To prevent this state of affairs and to adjust the relation of supply and demand most favourably for itself, the cartel took over the sale of alum, leaving its production in the hands of the lessees.

As long as the cartel contract lasted the parties were not allowed to sell alum independently without the knowledge of the other side. All contracts of sale were made jointly by agents of both partners, each of the latter delivered half of the quantity ordered. This provision was also in force when the order was accepted in full by only one partner. Certain exceptions were made in favour of the Papal mines on the ground of obligations incurred before the agreement with the mine in Ischia, which had secured its monopolistic position on certain markets. Should either of the partners be unable to supply his full portion, the deficit was made up by the other, who received a proportional share in the profit.

For all losses resulting from the fact that the delivered goods did not answer the quality ordered, the mine which supplied the consignment in question was directly responsible to the buyers, and not to the cartel.

¹ *Depositeria della crociata* 1464-1475, fol. 1-16, in *Archivio di Stato Roma* (cited by Strieder, ut sup., p. 172). “Ac novissime idem Sanctissimus dominus noster attente considerans eiusdem aluminis pretium eidem sancto operi dicatum ex eo diminui plurimum, quia alumen aliud ex minera Ischana, ad serenissimum principem dominum Ferdinandum regem Sicilie pertinentem ad easdem mundi partes deferrebat communiter, ad quas cruciate alumen delatum fuerat aut deferri sepius continebat, ita ut per concursum et habundantiam aluminis pretium utriusque impediretur et vilesceret, ordinatumque ipsius sanctae cruciate subsidium demum minime proveniret et prefatus serenissimus dominus rex cognoscens hec eadem requisiverit suam Beatitudinem, libenter Sua Sanctitas annuit et consensit ac pro communi utilitate aut utriusque commodo et utilitate cruciate ac reipublice praedictarum, ad conventiones, pacta et capitula modo et forma infrascriptis per supra et infrascriptos reverendos dominos cardinales deveniendum censuit, laudavit et mandavit. . . .”

The cartel also fixed the price at which alum had to be sold by the partners. If one of the partners made an agreement for delivery of alum below the cartel price, he was obliged to make up for the other partner's lost profit; otherwise the profit was always halved between both partners.¹

The agents of both contracting parties were as a rule obliged to sell for money and not, as was often the practice at that time, by way of barter. This simplified the accountancy of the cartel and secured it against losses resulting from the over-estimation of the value of goods taken in exchange for alum. Credit given for payment could not exceed a year, and a security or guarantee had always to be procured.²

The members of the cartel were, as regards the observance of the agreement, subject to a mutual far-reaching control, which was carried out by permanent special commissioners acting on behalf of one partner and having the right to inspect the mines and establishments of the other. These officials were in possession of the keys to all storehouses and could at any time inspect the stocks of alum. Both partners had to submit to them details of their output³ and sales. These commissioners

¹ *Depositaria della crociata*, ut sup. "Et dicti allumi non si possino vendere ne piu ne meno di quello li sera deputato li precii de la camera apostolica et de la maiesta del Signore Re; et si pur accadessi che per minor precio fosse vendito, per quello tale fussi facto tale vendita, si habbi a refare di sui beni quello meno fussi vendito, et per cadauno di quelli serano deputati a recevere et vendere dicti alumi.

"El retracto veramente de li allumi se habbia a dividere per mitta, zoè la mitta sia de la Sanctità di nostro Signore et l'altra mitta de la maesta de Signore Re."

² *Depositaria della crociata*, ut sup. "Che tutte vendite di allumi se faranno, si habbino a fare, per quelli serano deputati a vendere, a' dinari contanti et non abbarato, ne se pose vendere a piu longo tempo de anno uno vel circa, tamen cum idonea fideiussione et non aliter."

³ Thus the output remained also under the control of the cartel; but, as I have pointed out above, production was not apportioned. Formally it could be unrestricted, though actually it had to adjust itself to the limited possibilities of sale.

fulfilled the function of a *board of directors*, and the agents mentioned before, to whom the sale of alum belonged, acted as a *joint sales department* and administrative organ as regards sales.

The partners were obliged to notify each other of any abuse of which their agents might have been guilty at the sales.

To shut out Turkish competition on Christian markets, the Pope had also undertaken to issue every year to all loyal Christians a prohibition to buy and trade in the alum of the infidels, like that issued before the formation of the cartel. The sanctions therein were still more severe. All ships with loads of Turkish alum were outlawed and anybody could retain them as his property. If the alum seized was good he could sell it to the cartel at half the market price; otherwise it had to be deposited with the cartel under the supervision of its agents (the selling department) pending the expiration of the cartel agreement.¹

The representatives of the parties pledged themselves by placing their signatures on the deed and making solemn oaths to keep to the provisions of the contract as long as it remained in force. Its observance was secured by the Papal mine on all estates of the Holy See; and on the part of the mine in Ischia on all possessions of the King of Naples. Further, for breach of any of the clauses of the contract high penalty of 50,000

¹ *Depositeria della crociata*, ut sup. "Ogni anno se habbi a fare generale prohibitione de li allumi de li infideli et dicti allumi con li navili siano dati in preda a quelli li prendessero; ne li prenditori possino essere astrecti da niuna de le parte fare gratia ne alcuna misericordia a quelli fossino presi. Et volendo dare li allumi essendo boni et mercantili a la compagnia per la mitta meno de quello se vendera ne li lochi dove se condurano, la compagnia li debbia acceptare; non volendo darli, si possino tenere ma non vendere in quello locho dove capitareno sotto custodia de li deputati de la compagnia *final fine de dicta compagnia, et finito el tempo, li possino vendere.*" The concession expressed in the last sentence was, of course, only specious and had for the competition no practical consequences, as the first period of the existence of the cartel company was arranged for twenty-five years!

ducats was stipulated, payment of which did not release from a subsequent performance of the contract.

The alum cartel was referred to alternately in the instrument as the old Roman *societas*; further, as *compagnia*, *intelligentia conventio*, *unione*. In one place the contract states that both the alum undertakings of Tolfa and Ischia are to form, during the existence of the cartel, "*uno corpo overo maona*."¹

In the history of the cartel movement, the alum cartel is the first which on the ground of extant sources permits us to apprehend the internal structure of cartels at that time. Owing to the lack of similar information on earlier monopoly companies, it is difficult to ascertain their stage of development as compared with the alum cartel of 1470. Nevertheless, we are not justified in assuming any sudden jump in this process and it must, therefore, be assumed that the older companies had at an early date reached an advanced stage. Whatever the facts may be, the old monopoly *societas* (*monopolium*) exhibited in the alum cartel a form in no respect inferior to the organization of its modern successor. It was a *most up-to-date* price-fixing and conditions cartel of producers (*Preis- u. Konditions-Kartell*) with a centralized sale and common participation in profits. This, too, was four hundred and fifty years before the official date of the birth of cartels of this kind.

Professor Strieder, having in mind the salt cartel of 1301² and the alum cartel of 1470, the oldest known to him, advanced the thesis that the *earliest cartels were of a fiscal nature*.³ He

¹ The name "*maona*" was at the close of the fifteenth century equivalent to *compagnia di traffico* or *società di guadagno* (trading or commercial company). Cf. STRIEDER, *ut sup.*, pp. 172 et seq.

² Cf. *ante*, pp. 133 et seq.

³ STRIEDER, *Studien zur Geschichte Kapitalistischer Organisationsformen*, München, 1914, pp. 69 et seq.: "Die frühesten Kartelle, die mir bisher bekannt geworden sind, erscheinen nicht so sehr als Schöpfungen von Kaufleuten, sondern ebensoviel als *Erzeugnisse einer staatlichen Finanzpolitik*, die für sich die Berechtigung in Anspruch nahm, ein *Regal*, dass ihr *zustand*, durch *vertragsmässigen Ausschluss einer lästigen Konkurrenz von der Wertverminderung zu bewahren*. Das gilt z. B.

says that they were not so much a product of merchants as a result of the fiscal policy of the State, which tried to guard its royalties against depreciation caused by burdensome and irksome competition. Therefore it might not have been accidental that the salt cartel of 1301, the earliest known to him, originated in the very sphere where the State had often before manifested its monopolistic policy. At the same time, Strieder assures us that it would be a mistaken method to eliminate the possibility that the fiscal cartel, which quite accidentally came to our knowledge, was preceded by similar cartels of private enterprise. The circumstance that it is unknown to us does not preclude the possibility of their earlier existence. He deems this yet more probable, as conventions of this kind could not be set down in writing but had to be kept secret, because they conflicted with the ethico-economical views on *fair prices*. Consequently, there is no mention of them in the earlier historical sources, and it would be a mistake to be guided here by the principle "*quod non est in actus, non est in mundo*."¹

Nevertheless, Strieder sustains his thesis. Fiscal cartels, according to him, did not need to imitate private cartels, as they had "*as far back as the early Middle Ages*" numerous

von dem Salzvertriebssyndikat. . . . Das gilt auch von dem Kartell, das im Jahre 1470 Papst Paul II mit König Ferrante von Neapel einging. . . ." P. 164: "Vielleicht ist es kein Zufall, dass das älteste Kartell fiskalischer Werke, das mir bekannt geworden ist, gerade auf dem Gebiete des Salzhandels gegründet wurde, auf jenem Gebiet also, auf dem vielfach eine staatliche Monopolbewegung seit langem existierte."

¹ STRIEDER, *ut sup.*, pp. 162 et seq.: "*Auch hier wäre es aber ein methodischer Fehler, die Möglichkeit leugnen zu wollen, dass diesen 'fiskalischen' Kartellen, die uns zufällig bekannt worden sind, solche privater Unternehmer vorausgegangen sein können. Die Kaufleute hatten allen Grund, Abmachungen wie Kartelle, die der Wirtschaftsethik der Zeit mit ihrer scharfen Betonung des 'gerechten Preises' entgegengestanden, geheim zu halten. Oft wird es gar nicht zu schriftlichen Fixierungen der Konvention—die auf uns gelangen konnten—gekommen sein. Nichts wäre verkehrter, als hier quod non est in actis, non est in mundo zu schliessen.*"

examples of State monopolies, including the trades in salt, iron, etc.,¹ and also analogous cartel agreements made by various towns to eliminate mutual competition.²

It seems to me that this theory of Strieder is not accurate. To begin with, the historical fact established above, that both State and private monopolies were known not only "*as far back as the early Middle Ages*" but even earlier, speaks against it. They are as old in trade as is open competition. On the ground of the old anti-monopolistic laws, which are the earliest sources available, one may assume that the first monopolies were the work of private initiative. Thus is it presented to us by Aristotle, the well-known writer on monopolies. Having discussed the essence of private monopolies, Aristotle stated that many States also made use of the monopoly organization in order to increase their income.³

For want of more detailed information about the oldest monopolies, both private and fiscal, it is difficult to say how long their highly developed form of organization, which is exhibited in the alum cartel of 1470, has been known. In any case their identical nature and purpose are more than apparent. Strieder does not deny this fact; on the contrary, he states that it is the goal of every cartel to secure a monopoly.⁴

But apart from the undoubted fact that private monopolistic organizations existed centuries before, and taking the salt cartel of 1301 and alum cartel of 1470 as the first recorded in the history of the cartel movement, I have serious doubts as to the correctness of Strieder's thesis.

The salt and alum mines, like all other mining industries

¹ STRIEDER, ut sup., pp. 163 et seq.: "Auch die Tatsache, dass staatliche Monopole für gewisse Handelsgegenstände, z. B. für Salz, Eisen usw., *schon früh im Mittelalter existierten*, zeigt übrigens, dass man staatlicherseits die Vorteile des Monopoliums—*auf die ja jedes Kartell hinausstrebt*—wohl zu würdigen verstand."

² Strieder gives as an example the cartel agreement between Pisa and Lucca in 1181, which has been referred to on p. 132.

³ Cf. p. 93, ante.

⁴ Cf. citation on this page, note 1.

at that time, were from the earliest times almost invariably the property of the sovereign. But it was the general practice to let the administration and exploitation of these royalties to strictly private entrepreneurs, sometimes rich merchants, but more often to trading companies. These private entrepreneurs had foremost and direct interest in increasing the profitability of the industries rented by them. As often as occasion arose to eliminate an annoying competition which could not be got rid of save by agreement, the lead towards a cartelization of the competing enterprises was naturally taken by those who managed them. And these, almost without exception, were private merchants and companies. Feeling the pulse of the undertakings in question, they alone were competent to decide whether a cartel was necessary, and with whom and how it ought to be organized. They submitted appropriate suggestions as to the formation of the cartel to their sovereigns, but only because of the title with which the latter were invested as owners of the undertakings in question.

More important was the reason why cartels, being monopolies, were at that time prohibited by law. He who formed a cartel ran the risk of being charged with the perpetration of a crime. Only the sovereign, bearing the supreme power in the State, was able to protect the originators of the cartel against such unpleasant indictments. Further, the cartel gained thereby in strength and moral value. As the signatories to the agreement were plenipotentiaries of the kings, the cartel was safe and sound, need not be concealed, and could conduct its operations boldly "on the surface." And public opinion, permeated with the principles of the Christian anti-monopolistic economic morality of that time, had to be indulgent towards it, if only officially.

Above all, it was in the interest of the lessees themselves, who were intended to form a cartel to inveigle the monarchs into their operations. History proves that every sovereign, not excluding the Pope, gave ready ear to the insinuations of the officially condemned monopolists. They were always ready,

without the slightest hesitation, to commit the crime of monopoly (*crimen monopolii*) if only a lucrative opportunity of increasing their incomes and letting out the royalties arose. For public opinion and the anti-monopolistic legislation of their own countries such monopolies or cartels used excuses like "*common weal*" and "*higher purposes*," and amongst these *the struggle in defence of Christianity* was one of the favourite arguments also used by the alum cartel. Out of these circumstances a rather paradoxical situation arose. The monopolistic cartel movement of private entrepreneurs which had been condemned by law as *criminal* found most agreeable scope for its activity in the sphere of royal prerogatives. This was particularly conspicuous during the fifteenth century, but this point will be dealt with later. As can be clearly seen, the dominating factor was always the strictly private action of *private* merchants and trading companies; and it was merely out of necessity—the reasons for which have been given before—that it was moulded into the form of a firm of monarchs who owned the cartelized undertakings. The sovereign often co-acted at the formation of the cartel, but the initiative remained always in private hands.

Such was also the case with the formation of the salt and alum cartels, with which we shall occupy ourselves now. The afore-mentioned letter of Charles II of Naples, concerning the formation of a salt cartel, states expressly that the initiative was taken by the private tenants of the mines.¹ Although only the advantages to the State treasury were officially mentioned,² it is clear that they were the consequence of much better and greater profits of the private leaseholders, who divided with their sovereign the gains accruing from the cartel. Of course this could not be admitted publicly. Officially every cartel had to be idealized as much as possible as an institution serving the common welfare. I have already shown the similar origin

¹ Cf. citation on p. 134, note 1, "*sicut nobis est expositum*."

² Cf. citation on p. 134, note 1, ante.

of the alum cartel. But Strieder himself admits that all these *fiscal* cartels were formed by private tenants with the assistance of the public authority.¹

Consequently, I see no reason why even the cartels formed within the bounds of royal prerogatives should be distinguished as *fiscal* cartels. They were throughout a private product, though formed between State enterprises. The cartel agreement which connected them was of private and not public law. These cartels owed their origin as a rule to the private initiative of private entrepreneur-Leaseholders whose only concern was to increase their private income from the lease. The increased income of the king was rather a result of a fortunate coincidence of interests, owing to which the private cartel movement, condemned and legally prosecuted, secured a safe and exceptionally favourable shelter. Under these circumstances, it appears to me that to accentuate secondary features, such as the profit of the treasury and the fiscal character of these enterprises, and to rely on them when defining the nature of these cartels, disregarding the momentous rôle of private initiative, the real nerve of these "fiscal" cartels, is, to say the least, inaccurate.

In 1498 the most important *commercial* cartel of those days was formed with the support of Charles V in Augsburg.² It controlled the European copper market at Venice, having secured the sole right to purchase the whole copper output of the mines in Tyrol and Hungary, which supplied the Venetian market. This cartel was formed by four leading companies in the copper trade, headed by the Fugger company, which played an important rôle in the history of the cartel movement, especially during the sixteenth century.

The increasing output of copper in Tyrol and Hungary

¹ STRIEDER, *ut sup.*, p. 162.

² KÖNIG, *Peutingerstudien*, München, 1914, p. 109; EHRENBURG, *Zeitalter der Fugger*, Jena, 1912, Vol. I, pp. 396 et seq. and 417 et seq., where the transcript of the contract of this cartel is given.

outgrew the market requirements, which led to fiercer competition. Such rivalry resulted in a fall in the price of copper, which entailed considerable losses for these companies. The cartel was intended to prevent further losses and restore the profit-earning capacity of the undertakings.

According to the contract of this cartel, the information of which we owe to the valuable original research of Professor EHRENBURG, the companies brought under the cartel in the first place fixed the whole amount of copper which could be thrown on the market of Venice. From the total quantity adjusted to the market capacity exact lots stated in figures were apportioned to each company.

In order to achieve a strict observance of the quotas by the respective companies, the latter were not allowed to sell on their own initiative but had to do so through a kind of *common selling agency*. This was so formed that the exclusive right and duty to sell copper was conferred on the Fugger house. At the same time, the order in which the quotas of each member had to be sold were predetermined. The costs of management of the Fugger company in their capacity as central selling agency were proportionally borne by each of the members.

The cartel also standardized the *selling prices*. The maximum and minimum limits were determined, within which the selling agency could vary the price provided that the prices were *moderate (zimliche)*, so as to sell out the quota as quickly as possible. In case of large wholesale orders the contract provided reduced prices.

Further, the contract prescribed that no member could market his stock before the whole quota of copper was sold out, for fear that he might compete with the cartel. In this provision the same idea found its expression which in the case of the oldest corn monopolies tried to intercept ships conveying corn, thereby adjusting supply to demand in a manner advantageous for the monopoly organization.

About a year after the formation of this cartel, the above

provisions were violated by the Fugger company, which sold without the knowledge of the cartel a considerable amount of copper to the firm of THURZO. This purchase of copper competed later with the cartel. As a result of this the cartel was broken up.

Professor Ehrenberg, when discussing the cartel, justly stated that it was a *proper commercial monopoly of exactly the same kind as present syndicates and trusts*, not calculated to force up prices to the detriment of society.¹ Similarly KOHLER rightly calls the Fugger company a cartel.² Indeed, it was a typical price-fixing cartel of merchants with apportioned sale and a common selling agency. Having done away with the old rivalry of its members, the Fugger cartel secured a monopolistic position on the market. It adjusted the so far uncontrolled and consequently excessive supply of copper to the requirements of this market. Thus the cartel arrested the natural decline of the price of copper and calculated it in such a way that it could make the companies under the cartel pay better without making undue use of its position to the prejudice of purchasers.

The circumstance that the Fugger cartel and company was the work of merchants and not of the producers themselves, as was the case with the alum cartel of 1470, which latter case became a rule under analogous conditions to-day, does not negative the cartel character of this organization.

¹ EHRENBURG, ut sup., Vol. I, p. 397: "*Hier liegt also ein wirkliches Handelsmonopol vor, ganz nach Art unserer Syndikate, trusts, etc., und zwar ohne die Absicht gemeinschädlicher Preissteigerung, wie PEUTINGER mit Recht sagt.*"

Dr. Peutinger, a well-known jurist of the period and counsel to import merchants of Augsburg, and whom I mentioned before, stated when giving his opinion in the case of the copper cartel that the latter was legally permissible, as it aimed merely at a quicker sale of copper at a moderate price, and was therefore not detrimental to society (*Consilium in causa societatis cupri*, manuscript in the municipal library of Augsburg, Cod. 2° Aug. 398, fol. 193).

² KOHLER, *Unlauter Wettbewerb*, ut sup., p. 4. He also cites the contract of this interesting cartel.

Isay, however, refers to the above-mentioned view of Kohler and calls it erroneous, because the Fugger company was not a cartel but a typical *ring*, a *temporary company for the sale of certain limited lots of copper*. In support of this statement he adduces a fragment of a sentence in the contract which runs: "*a certain amount of copper has to be put together and sold jointly at Venice.*" From this he infers that the purpose of the company was of a transitional and speculative character, intended for a common sale of the stock of goods collected by its members.¹ Had Isay taken into consideration not merely a few words taken from the middle of the contract, but the whole contract and the origin from which it sprang, which quite clearly speaks against any conception of a sporadic, single, speculative buying up of goods, i.e. a so-called *ring*, he would undoubtedly have admitted that one could hardly find a better example of a cartel than the copper company of 1498. It appears that Isay is misled in no small degree by the circumstance that this company was formed not by copper producers themselves but by merchants. This follows from a passage immediately preceding this part of his argument. This view had for a long time been put forward in the cartel literature as the essential mark distinguishing cartels from rings. On the other hand, Isay recognizes the existence of commercial cartels (of merchants) and thereby shows inconsistency.

This divergence of opinions on principle between Isay and Kohler as to the character of the Fugger company forms a valuable contribution to the science of *rings*. On the one hand, a distinguished jurist of high standing like Kohler, renowned for his mental acuteness, calls a certain economic organization a cartel, which is, on the other hand, branded as *ring* by Isay, among the leading authorities on the cartel problem in the contemporaneous German cartel literature and practice. It

¹ ISAY, *Die Entwicklung der deutschen und ausländischen Kartell-gesetzgebungen*, Berlin, 1930, p. 6.

And LIEFMANN (*Unterm.-Verb.*, ut sup., p. 136) calls this cartel a "*corner*"!

proves only how unnatural and obscure, and in practice intangible, is this whole science about an "essential" difference between cartels and rings.

Side by side with the monopoly movement shown above, *guilds* (*crafts*, *mystères*, *corporations de métiers*, *Zünfte*) embracing the whole industry and partly also commerce (especially in England, where *merchant-guilds* preceded *craft-guilds* by almost a hundred years)¹ developed in Europe since the closing years of the twelfth century, and continued unbrokenly until the end of the eighteenth or beginning of the nineteenth centuries. In spite of the popular theory that the system of guild economy lasting for some centuries broke the connection between old monopolies and modern cartels and trusts, guilds, as we shall see, did not even for a moment arrest the monopoly movement. One cannot be surprised, for guilds, in spite of the view of those who represent them as diametrically opposite to cartels and trusts, and all monopolistic combinations in general, were primarily symptoms of the monopoly movement which simultaneously expressed itself in different forms in all other spheres of industry and commerce not covered by the guild organization.

It would be going beyond the limits of this work to deal exhaustively with all questions appertaining to guilds, which in the history of economics form a separate large chapter with an immense bibliography. I should like only to point out here that the view of those who, notwithstanding the various unascertainable and often sheer improbable conjectures of

¹ GROSS, *Gilda Mercatoria*, Göttingen, 1883, p. 32; ASHLEY, *English Economic History and Theory*, London, 1892, p. 71; BRENTANO-SMITH, *English Gilds*, London, 1870, p. 93, finds traces of merchant guilds as early as the second half of the tenth century; CASTELOT, in *Palgrave's Dictionary*, London, 1923, Vol. II, p. 209, states that the earliest references to guilds are found in the *Carolingian Capitularies* of 779 and 789; likewise GROSS, *ut sup.*, p. 9; UNWIN, *The Gilds and Companies of London*, 1925, pp. 15 et seq.; EBERSTADT, *Der Ursprung des Zunftwesens* . . ., Leipzig, 1900.

theorists as to the genesis of guilds,¹ suggest that the same tendency towards monopolistic control and elimination of competition which created all other ancient and modern monopolistic organizations is also the actual cause of the origin of guilds, is well founded.

This we can see beyond doubt from the earliest extant documents appertaining to the formation of guilds both in England and on the Continent. Certain provisions recurring in all guild regulations, such as standardizing the size of the enterprise (by fixing the number of journeymen, etc.), the number of members, hours of work, amount of output, conditions of sale (place, time, prices, etc.), frequently also the purchase of raw materials, further prohibiting members from mutual competition in any form; in particular, from soliciting the custom belonging to their fellow members, finishing the work started by another member, etc., and, finally, the important provisions eliminating non-members and strange artisans and merchants from the right of exercising a given trade in a

¹ There are even such writers as SOMBART (*Der moderne Kapitalismus*, Leipzig, 1902, I, p. 125), according to whom a good many of the causes of the origin of guilds and all corporations in former days are altogether outside considerations of design. He regards guilds and corporations as a continuation of the old community of blood and place. He says: "*Ganz sicher liegt ein grosser Teil der Gründe, die zur Bildung von Zünften und Gilden, wie zur Genossenschaftsbildung in früher Zeit überhaupt geführt haben, jenseits aller Zweckmässigkeitserwägungen. . . . Und es scheint mir ein besonders glücklicher Gedanke zu sein, darauf hinzuweisen, dass ja die Handwerker in unserem Sinne die ersten Wesen waren, die als selbstständige Persönlichkeiten ausserhalb der alten Gemeinschaftsverbände, losgelöst von Stamm, Dorf, Familie zu existieren bestimmt waren. So dass wir ihre Verbände zunächst einmal als gar nichts anderes denn als Fortsetzungen der alten Bluts- und Ortsgemeinschaften zu betrachten haben.*" And also in the second edition, München, 1928, I, Pt. I, pp. 192 and 190 sqq. He represents guilds as a transplantation of the old "*Hufenverfassung*" in industrial and commercial conditions. "*Das System handwerkemässigen Schaffens ist nichts anderes als die Übertragung der Hufenverfassung auf gewerbliche (und kommerzielle usw.) Verhältnisse.*"

certain locality are strong evidence for the following two points:

First, as in the later manufacturing industry and modern commerce, so in the earlier handicraft and commerce, supply was always exceeding demand, the result of which was competition, reducing the earnings of artisans and merchants.

Secondly, guilds were a reaction of those who suffered from this competition, which they eliminated almost altogether, aiming at a monopolistic control of industry and commerce in their markets. In order to carry out their object more effectively, guilds restricted not only competition but also directly production, adjusting it to the marketing possibilities. This was the pith and marrow of guilds; it was also the axis on which everything else turned.¹

¹ GROSS, *The Gild Merchant*, Oxford, 1890, I, pp. 36 et seq.; ASHLEY, *English Economic History and Theory*, London, 1892, pp. 70 et seq.; BLAND-BROWN-TAWNEY, *English Economic History*, London, 1914, pp. 112 et seq.; CUNNINGHAM, *The Growth of English Industry and Commerce during the Early and Middle Ages*, Cambridge, 1922, 5th ed., pp. 219 et seq. and 336 et seq. On p. 220 we read: "The object of these associations (viz. merchant guilds) appears to have been the regulation of trade. . . . *This exclusive right of dealing is what strikes one most forcibly in all the documents connected with guilds*"! CHEYNEY, *Industrial and Social History of England*, New York, 1920, revised edition, p. 52: "*The principal reason for the existence of the gild was to preserve to its own members the monopoly of trade*"; CASTELOT, in *Palgrave's Dictionary*, II, p. 210: "Its chief function was to regulate the trade monopoly. . . ." P. 212: "*But the regulation of industry was always paramount to social and religious aims; the chief object of the fraternity was to supervise the processes of manufacture and the monopoly of working and dealing in a particular branch of industry. The organization and the aims of the craft societies of the Continent were similar to those of England*"; LIPSON, *The Economic History of England*, Vol. I, "The Middle Ages," London, 1929, 5th ed., pp. 239 et seq. On p. 295: "*The primary purpose of the craft gild was to establish a complete system of industrial control over all who were associated together in the pursuit of a common calling*." P. 296: "*It was first and foremost undoubtedly an industrial organization. . . .*" See also Vol. III, "The Age of Mercantilism," London, 1931, pp. 330 et seq. Similarly MARTIN SAINT-LÉON, *Histoire des corporations de métiers depuis leurs origines jusqu'à leur*

Guilds, as such, especially craft guilds, were no novelty. Analogous associations of artisans were known in Antiquity—in China, India, Greece, Rome, etc.¹ It is difficult to ascertain whether these, especially the Roman *collegia*, are connected with the later guilds.² Although the tradition of the former lived in the Middle Ages, guilds, like all other ancient monopolistic organizations and the later cartels and trusts, were such a natural phenomenon that they did not need any models to follow. Competition had by its nature always led competitors to agreements that would bring better profits. The idea of monopoly, like competition, does not require any examples, it is at the bottom of human nature. At the utmost the forms of the idea were copied; this idea presented itself as the sole natural defence against the injurious effects of competition, which was also natural.

suppression en 1791, Paris, 1897, pp. 117 et seq. and 133; BABLED, *Syndicats de producteurs*, Paris, 1892, pp. 3 and 16 et seq.; NEUBURG, *Zunftgerichtsbarkeit und Zunftverfassung vom 13. bis 16. Jahrhundert*, Jena, 1880, p. 89; BELOW, *ut sup.*, pp. 270 et seq., 278, 281, and 299.

¹ BURGESS, *The Guilds of Peking*, New York, 1928. On p. 67 he points out guilds that existed in China upwards of 2,500 years B.C. PARETO, *Cours d'Économie politique*, Lausanne, 1896, pp. 141 et seq. (Associations ouvrières à Athènes et à Rome); also *Manuel d'économie politique*, Paris, 1927, p. 462; STÖCKLE, *Spätromische und byzantinische Zünfte*, Leipzig, 1912. Cf. also pp. 111 et seq. For monopolistic organizations in Ancient India see pp. 89 et seq.; SOMBART, *Der moderne Kapitalismus*, Leipzig, 1902, I, p. 90, erroneously excludes the possibility that there existed in India other artisans, apart from those appointed by the municipality, and who exercised their trade as a public office.

² ASHLEY, *ut sup.*, p. 77: "No doubt modern historians have exaggerated the breach of continuity between the Roman and the barbarian world; no doubt the artisans in the later Roman Empire had an organization somewhat like that of the later guilds. Moreover, it is possible that in one or two places in Gaul certain artisan corporations may have had a continuous existence from the fifth to the twelfth century."

CASTELOT, in *Palgrave's Dictionary*, London, 1923, Vol. II, p. 209: "Some writers, especially Goote and Lambert, regard them as a continuation of the Roman *collegia* and *sodalitates*. There are certainly striking analogies between Roman and Germanic fraternities, but there is little evidence to prove their unbroken continuity of existence."

And, as such, guilds, like all other monopolistic federations of producers or merchants, based their existence in the first place on the will of those whose interests they served.¹ The fact that the character of *public corporations*, for which certain branches of industry were reserved, was conferred upon them was the result of the efforts of the guilds themselves, thus enabling them to realize their object more effectively. But this did not impair their monopolistic nature; on the contrary, this was considerably strengthened. Hence it was a failure from the very beginning to oppose on this account guilds to later cartels and trusts, as institutions different "*toto coelo*."² This misconception became more obvious in later years; for also modern cartels (syndicates) frequently were, and still to-day are, like guilds, coercive organizations; nevertheless, they are never separated on this account from the general group of cartels and trusts.

The secondary importance of the religious element, mutual assistance, equality, just division of labour and gain; all these much overrated brotherly sentiments,³ which it was alleged

¹ GIERKE, *Das deutsche Genossenschaftsrecht*, Berlin, 1868, Vol. I, p. 244. See also I, pp. 359 et seq.; BELOW, ut sup., p. 271; MAURER, *Geschichte der Städteverfassung in Deutschland*, Erlangen, 1869-1871, II, pp. 345 et seq. Quite incorrectly LIEFMANN, *Kartelle . . .*, ut sup., 8th ed., 1930, p. 21: "Dies (*scil.* Zünfte) waren jedoch *keine freien*, sondern staatlich-geregelte Verbände, die auch *nicht zum Zwecke der Erzielung einer Monopolstellung* geschaffen wurden, sondern die der Förderung des Standes und gesellschaftlichen Interessen ihrer Mitglieder dienten."

² SCHOENLANK, ut sup., pp. 519 et seq.; BÜCHER, *Die wirtschaftlichen Kartelle*, ut sup., pp. 145 et seq.; MENZEL, ut sup., pp. 19 et seq.; OFFNER, ut sup., p. 188; GRUNZEL, *Kartelle*, ut sup., p. 8; and others.

³ SCHÖNBERG, *Zur wirtschaftlichen Bedeutung des deutschen Zunftwesens im Mittelalter*, Berlin, 1867, p. 101: "Deshalb wird die Produktion und der Absatz innerhalb der zünftigen Arbeit die freie Concurrenz ausgeschlossen, an ihrer Stelle wird das sie negierende Prinzip der Gleichheit und Brüderlichkeit zum Fundamentalsatz des wirtschaftlichen Zusammenlebens der Zunftgenossen gemacht, un dessen Verwirklichung, soweit es die wirtschaftlichen Gesetze gestalten, angestrebt." Likewise KLEINWÄCHTER, ut sup., pp. 96 et seq.;

pervaded guilds as against present cartels and trusts, is best shown by the further evolution of guilds. Instead of rejoicing at the ever-increasing number of brothers drawn into the fold, seeking there religious comfort, brotherly love, etc., guilds, it would appear, in defiance of logic took pains from their very inception to keep the number of members as low as possible. According to the oldest German guild charters (*Zunftbriefe*) find that as early as the twelfth century considerable obstacles and difficulties were placed in the way of new members; already the practice obtained that only a son or other near relative of a guild member could be admitted, and later this became the rule.¹ In some cases the enrolment of new members did not depend on the fulfilment of any objective conditions, but was left entirely to the discretion of the guild.² What those who admire the guilds as associations of brotherly love have described as "torpidity" and "regeneration," and which they say first became apparent in the seventeenth and eighteenth centuries,³ was actually present almost from the beginning; it was but a natural and consistent endeavour to maintain the true object of the guilds, i.e. to limit production in order to

WYGODZINSKI, *Wandlungen der deutschen Volkswirtschaft im 19. Jahrhundert*, Köln, 1907, pp. 14 et seq. Schönberg's work is highly praised by SOMBART, who says that he does not know a better and wiser book on guilds. In the first edition of his *Der moderne Kapitalismus*, I, p. 127, we read: "*Vor allem die Schrift Schönbergs erscheint mir noch heute als eine unübertroffene Meisterleistung, die ungefähr alles enthält, was füglich von der alten zünftlerischen Handwerkerorganisation gescheiterweise ausgesagt werden kann.*" In the second edition, however, he not only abstained from such enthusiastic praise, but even did not mention the existence of Schönberg's book.

¹ KEUTGEN, *Urkunden zur städtischen Verfassungsgeschichte*, Berlin, 1899, pp. 350-362; BELOW, *Probleme der Wirtschaftsgeschichte*, Tübingen, 1926, 2nd ed., pp. 282 et seq.; NEUBURG, *ut sup.*, p. 89.

² Thus, for instance, the guild charters of the goldsmiths of the town Braunschweig, 1231, in "*Zunftbriefe*" of Magdeburg shoemakers, 1152. Cf. BELOW, *ut sup.*, pp. 284 et seq.

³ GIERKE, *Das deutsche Genossenschaftsrecht*, Berlin, 1868, t. I, p. 916; SOMBART, *Der moderne Kapitalismus*, München, 1928, I, p. 387.

balance supply and demand and thus enable guild members to derive the greatest profit from their enterprises. Any further increase in guild membership, at that time already too high, inevitably meant over-production and a fall in prices; or, what also amounted to the same thing, a lowering of existing quotas.¹ It is no wonder guilds fiercely resisted such possibilities; but finally they had to succumb under the same competition that brought them into being. Their end was identical with that of all other monopolistic federations of producers and merchants, modern cartels, and trusts.

That there was no question of class exclusiveness follows from some provisions in the oldest guild charters on the Continent. The entrance fees were considerably higher for those members who intended to exercise their crafts than for those who wanted to join the guild only for social or religious purposes.² The later evolution of guilds sheds great light on their original purpose and shows that all the motives of a brotherly, social, and religious nature remained in the background; if guilds emphasized these attributes it was only to cloak the perpetration of the monopoly crime, which the Christian Church, whose patronage guilds so eagerly solicited, opposed.

The desire of the guilds to exclude new members became more and more strict in the course of time, dictated by the natural and intelligible desire not to weaken their monopoly, which the excess of supply to demand endangered, and it gainsays the conception of GIERKE, held on the Continent, that guilds were a class organization and therefore essentially

¹ Valuable material showing the discrepancy between the mission of guilds as idealized in literature and reality is contained in the works of KULISCHER, "Zur Entwicklungsgeschichte des Kapitalismus," in *Jahrb. f. Nat. u. Stat.*, Vol. XIX, pp. 451 sqq. and 593 sqq.; KLOSE, *Darstellung der inneren Verhältnisse der Stadt Breslau vom Jahre 1458 bis zum J. 1526*, Breslau, 1847; EULENBURG, *Drei Jahrhunderte städtischen Gewerbesens, Zur Gewerbestatistik Alt-Breslaus 1470-1790*, Leipzig, 1904.

² Thus, for instance, in *Zunftbriefe* of turners of Cologne, 1178-1182, cited by BELOW, *ut sup.*, p. 284.

different from later cartels and trusts.¹ We shall see later that big merchants, as well as producers in the mining and manufacturing industries, made use of this class organization. They did not seek religious solace and social entertainment, but wanted to pursue a monopolistic policy with safety. It had not always been understood that guilds were primarily institutions of an economic nature, their development coinciding with the growth of towns and political struggles of townsmen grouped in guilds, this considerably darkening the picture of guilds.

The views of those who compare old guilds with modern cartels and trusts are, therefore, correct; the non-essential difference lies in the fact that formerly there were merchants and small artisans and local markets, while to-day we have large manufacturing enterprises, mostly in the form of joint-stock companies, which supply national or world markets and have large amounts of capital at their disposal. This, however, does not alter the fact that in essence they are the same—monopolistic organizations.² Seen in the perspective of the whole monopoly movement, the monopolistic character of guilds is shown up in relief and is more readily understood.

¹ GIERKE, *ut sup.*, I, pp. 224 et seq.

² SCHMOLLER, *Volkswirtschaftslehre*, *ut sup.*, I, p. 50: "*Seit es Konkurrenz- und Marktkämpfe giebt, haben immer die klügsten Interessenten versucht, solche Verbindungen herzustellen. Die Zünfte waren dasselbe, was heute die Fabrikantenvereine, Trusts, Ringe und Kartelle sind.*"

On p. 450 we read: "Sie unterscheiden sich von älteren analogen Anläufen, z. B. den *Zünften*, den organisierten Verlegern, den regulierten Compagnien dadurch, dass es sich heute nicht um Kaufleute und Kleinmeister, sondern um Grossbetriebe mit Maschinenanwendung, meisst um Aktiengesellschaften mit sehr grossen Kapitalien und um sehr viel grössere Märkte ganzer Grosstaaten oder Weltteile handelt."

Likewise SEEBOLD, *ut sup.*, p. 629; MEYER, *Der Kapitalismus fin de siècle*, Wien, 1894, p. 296; WEISSKIRCHNER, *ut sup.*, p. 4; MES-SINGER, *Die Kartelle und der ungarische Gesetzentwurf*, Budapest, 1905, pp. 53 et seq.; HUBER, A., *ut sup.*, p. 4; BABLED, *ut sup.*, pp. 3 et seq., 16 et seq., and 151; WILLIAMS, *ut sup.*, pp. 17 et seq., Cf. also the writers quoted in the Introductory.

CHAPTER V

Anti-monopolistic and anti-cartel legislation in the sixteenth and seventeenth centuries.—The Reichstagabschied of 1512 and analogous resolutions of later German Reichstags.—Resolutions of the Saxon Landtag in 1527 and 1534.—The Polizeiordnung in 1548.—The Netherlandish edict of Charles V in 1540.—The Polizeiordnung of 1577.—Ordinances of the French kings, particularly of Francis I in 1531 and 1539.—The Edict of Louis XIV of 1676.—Analogous anti-monopolistic “Ordonnances de Police du Châtelet de Paris” and “Arrests du Parlement.”—The anti-monopolistic statutes of the English kings Henry VIII, Edward VI, and James I

THE sixteenth century is a period of an exceptional success in the cartel movement, particularly in the German countries. This is strikingly reflected by the numerous anti-monopolistic resolutions which German Reichstags and Landtags modelled after the principles laid down by Roman Law. Decisive steps against monopolistic organisations were taken first by the *Reichstag in Treves and Cologne*, in the year 1512.¹ This Reichstag stated

¹ *Aller des heiligen Römischen Reichs gehaltene Reichstäge, Abschiede und Satzungen samt anderen Kayserlichen und Königlichen Constitutionen*, Maynz, 1660, *Abschiedt dess Reichstags zu Triere u. Cölln anno 1512*, pp. 89 et seq., § 16.

“Und nachdem etwa viel grosse Gesellschaft in Kauffmann-schaften in kurtzen Jahren im Reich aufgestanden, auch etliche sondere Personen sind, die allerley Waar und Kauffmanns-Güter, als Specerey, Ertz, Wöllen-Tuch und dergleichen in ihre Händ und Gewalt allein zu bringen unterstehen, Fürkauff damit zu treiben, setzen und machen ihnen zum Vorteil solcher Güter den Wehrt ihres Gefallens, fügen damit dem hl. Reich und allen Ständen desselbigen merklichen Schaden zu, wider gemein beschriebene Kayserliche Rechte und alle Erbarkeit: Haben Wir, zur Förderung gemeines Nutz und der Nothdurfft nach, geordnet und gesetzt und thun das hiemit ernstlich und wollen, dass solche schädliche Handthierung hinführo verboten und ab sey und sie niemands treiben oder üben soll. Welche aber wider solches thun würden, deren

that monopolies organized by both *companies* (cartels) and individual merchants had developed in recent years, not only as regards provisions, in spite of the existing prohibitions and the prevailing honesty. To prevent this and for the benefit of the general weal the Reichstag interdicted most severely the formation of harmful organizations (*schädliche Handthierung*) concentrating an article in their hands and power ("*in ihre Händ und Gewalt*") and dictating at pleasure higher prices.¹ Further, it was prohibited to enter with suppliers and buyers into so-called *exclusive* contracts, which excluded competitors from supplying or purchasing, or which prohibited suppliers from delivering goods to non-members of the cartel, below a mutually fixed minimum price so

Haab und Güther sollen confiscirt und der Obrigkeit jeglichen Orts verfallen seyn. Auch dieselbe Gesellschaft und Kauffleut hinführo durch kein Obrigkeit im Reich geleitet werden, sie auch desselben nicht fähig seyn, mit was Worten, Meynungen oder Clausuln solche Geleit gegeben werden.

§ 17. "*Doch soll hiedurch niemands verboten seyn, sich mit jemand in Gesellschaft zu thun, Waar, wo ihnen gefällt, zu kauffen und zu verhandthieren; dann allein, dass er die Waar nicht unterstehe in eine Hand zu bringen und derselben Waar einen Wehrt nach seinem Willen und Gefallen zu setzen, oder dem Kauffer oder Verkauffer andinge solche Waar niemands dann ihm zu kauffen zu geben oder zu behalten; oder dass er sie nicht näher geben wolle, dann wie er mit überihm überkommen hat.*

§ 18. "*Wo aber die, denen hierinn Kaufmannschafft zu treiben, wie obsteht, unerlaubt ist, unziemliche Theuerung in ihren Waaren zu machen unterstehen würden, darin soll eine jede Obrigkeit mit Fleiss und Ernst sehen, solche Theuerung abzuschaffen und einen redlichen, ziemlichen Kauff verfügen. Wo aber einige Obrigkeit in solchem lässig oder säumig seyn und das an unsern kayserlichen Fiscal gelangen wird, so soll unser Fiscal solches der Obrigkeit, da solche Kauffleut oder Handthierer gesessen oder wohnend seyn, zu erkennen geben und sie ermahnen, solche beschwerliche Handlung abzuschaffen und zu straffen in Monats-Frist. Dann wo die Obrigkeit solches in bestimmter zeit nicht that, so wolt und müsst er aus seinem Amte in solchem procediren und fürnehmen, wie sich gebührt; alsdann er auch solches zu thun, Macht und Recht haben, auch unverzüglich thun soll.*"

¹ Cf. the first paragraph of the Reichstagabschied, cited in the preceding note.

as to make competition impossible, or at least exceedingly difficult.¹

Companies as well as individual merchants who acted against those prohibitions were, as in the constitution of Zeno, punished by the confiscation of their whole property. Moreover, instead of banishment, they were deprived of the legal protection of the authorities throughout the whole country. The competent local authorities were specially instructed to see that the anti-monopolistic enactments of the Reichstag were strictly observed; they were made responsible for the prosecution and punishment of the offenders.²

At the same time the Reichstag stated expressly that it did not take exception to trading companies as such. Their formation as heretofore was left unrestrictedly to the free arrangement of the parties, so long as they did not tend towards a monopolization, i.e. a concentration in their hands of a particular merchandise for the purpose of an arbitrary dictation of its price.³ This detail is very important. It corroborates the strictly anti-monopolistic character of the Reichstag provisions, which combated trading companies not on account of their collective organization, which by the way had often previously been, and also subsequently was, the object of legislative prohibitions,⁴ but because of their *monopolistic* aims.

As the constitution of Zeno and all previous monopoly prohibitions proved ineffectual, so the resolutions of the Reichstag in 1512 could not suppress the cartel movement. Therefore its clauses were many times repeated in the acts of later Reichstags, particularly in that of Nuremberg in 1522-23,

¹ Cf. second passage of § 17 of the Reichstagsresolution, cited on p. 177 note 1.

² Cf. § 18 of the Reichstagsresolution, cited on p. 177, note 1.

³ Cf. first sentence of § 17 of the Reichstagsresolution, cited on p. 177, note 1.

⁴ SCHULTE, *Geschichte des mittelalterlichen Handels und Verkehrs zwischen Westdeutschland und Italien*, Leipzig, 1900, Vol. I, p. 608.

of Speyer in 1526 and 1529,¹ and of Augsburg in 1530 and 1532.²

The debates in the Reichstags preceding the issue of such laws confirm their obvious intention to comprise not only monopolies secured by individuals through the buying up of goods, but also the more menacing monopoly companies, i.e. cartels, which often made use of the same means to monopolize the market. For instance, in the commission report of the monopoly department of the Reichstag in Nuremberg in 1522-23, companies are branded which "*make clandestine agreements, how (i.e. above all at what price) to sell their goods, and that none of them should induce or urge upon the other to sell cheaply.*"³ The gist of our modern price-fixing cartels.

Monopolies were also combated by the particular legislation of the various German countries.

The *Landtag* of *Dresden* in 1527 condemned the price-fixing cartel of the Saxon tanners, which had raised the price of leather, thus bringing about a dearness of shoes and boots in the country. The *Landtag* excused the shoemakers, stating that they were compelled to do this, owing to leather having become dearer.⁴

The Saxon *Landtag* of 1534 forbade the formation between

¹ *Aller dess heiligen Römischen Reichs gehaltene Reichstäge . . .*, ut sup., Maynz, 1660, pp. 180 et seq., pp. 192 et seq.

² *Römischer Kayserlicher Majestät Ordnung und Reformation guter Polizey . . .*, zu Augspurg, anno 1530, pp. 246 et seq.

³ *Kluckhon-Wrede, Deutsche Reichstagsakten*, Jüngere Reihe, Gotha, 1893-1905, Vol. III, p. 589: ". . . heimlich verstant mit einander machen, wie sie iderlei irer war geben wolten, damit ir keiner den anderen zu wolfeilen kauf verursacht oder dringe."

STRIEDER, *Studien . . .*, ut sup., p. 184, comments upon the above passage of the communication of the monopoly department of the Reichstag, and pertinently observes: "*Ich weiss nicht, was man unter den so charakteristischen heimlichen Verabredungen der Kaufleute anders verstehen will, als Kartelle.*"

⁴ *Leipziger Ratsarchiv*, Tit. II, A, Nr. 1, cited by Strieder, ut sup., p. 186: ". . . Zum siebenden, sollte guth achtung zu geben sein auf die gerber, die durch ire voraynigung am leder den schustern theurung einführen. Daraus fleust, dass die schuster die schuen auch vorthewren müssen."

merchants of *cartels for common purchase* and sale of wool. They dictated uniform purchase or sale prices, binding all contractors without exception. The local authorities were entrusted with the administration of the law.¹

The *Reichspolizeyordnung* of 1548 stated, similarly to the *Reichstagsabschied* of Cologne and Treves of 1512, that *monopolia and treacherous and dangerous Fürkauffs* had been the regular practice, despite the prohibitions of the common law and the numerous resolutions of the Reichstag providing therefor penalties such as forfeiture of property and banishment. These monopolies made use of excluding contracts as before so as to eliminate competition more effectively. The *Reichspolizeyordnung* of 1548 reintroduced prohibitions of all such harmful agreements ("*schädliche Handthierungen, Auffund Fürkauff, und derhalben gemächte Geding, Vereinigung und Pact*") to which the hitherto existing sanctions were attached.²

¹ *Codex Augusteus oder Vermehrtes Corpus iuris Saxonici*, ed. Lünig J. Chr., Leipzig, 1724, Vol. II, Pt. III, p. 44, cited by Strieder, ut sup., p. 185: ". . . Es sollen auch die Ritterschaft und die Städte fleissig Achtung haben, damit die Wollenkäufer und Vorkäufer sich nicht versammeln und einigs Kauffs sich vereinigen, wie sie die Wolle und nicht anders kauffen und verkauffen wollen; und wo sie solche Vereinigung der Wollenkäufer und Vorkäufer befinden, die sollen von jeder Obrigkeit darum gebührlich gestrafft werden und die Städte solches alle Schaar- und Wollen-Märkte ausrufen lassen."

STRIEDER, remarking on the above provisions of the Saxon Landtag (p. 185), rightly observes: "*Es handelt sich um Einkäuferkartelle, wie sie uns auch sonst aus dem 16. Jahrhundert und früher bekannt sind.*"

² *Reformation guter Polizey zu Augspurg anno 1548*, Tit. XXVIII, pp. 464 et seq.

"§ 1. Wiewol die Monopolia, betriegliche, gefährliche und ungebürlliche Fürkauff, nicht allein in gemeinen geschriebenen Rechten, sondern auch in gemachten und publicirten Reichsabschied, bey grossen Peen und Straffen als Verlust aller Haab und Güter und Verweisung des Lands verboten: So ist doch solchne Satzungen, Abschieden und Verbott biss anhero mit gebührlicher und schuldiger Vollnziehung gar nicht nachkommen noch gelebt worden, sondern seynd in kurtzen Jahren etwa viel grosse Gesellschaft in Kauffmanns-Geschäften, auch etliche sonderbare Personen, Handthierer und Kauffleut im Reich auffgestanden, die allerley Waaren und Kauffmanns-Güther, auch Wein, Korn, und

An analogous law was promulgated in 1540 by the emperor Charles V for *The Netherlands*, "*to prevent losses resulting from monopolies and improper contracts, which many merchants and artisans made in our Netherlands, to the detriment of other good and honest merchants, artisans and against the commonweal.*"¹

anders dergleichen, von denen höchstens bis auf die geringsten (in welchen sie dann in den Landen hin und wieder gute Kundschaften und Verwahrnuss haben, sonderlich wann die Waaren verderben oder sonst in Aufschlag kommen, und ehe die andere Kauffleuth solches gewahr werden) *in ihre Hand und Gewalt allein zu bringen unterstehen, Auff- und Fürkauff damit zu treiben, und denselben Waaren einen Werth nach ihrem Willen und Gefallen zu setzen, oder dem Kauffer oder dem Verkäuffer anzudingen, solche Waaren niemands dann ihnen zu kauffen zu geben oder zu behalten, oder dass er der Verkäuffer sie nicht näher oder anders geben wöll, dann wie mit ihme überkommen*, fügen damit dem H. Reich und allen Ständen desselben mercklichen Schaden, wider obvermelte geschriebene Recht und alle Ehrbarkeit, zu.

"§ 2. *Hierauf haben wir zu Förderung gemeines Nutzens und der Nothdurfft nach verordnet und gesetzt, und thun das hiemit ernstlich und wollen, dass solche schädliche Handthierungen, Auff- und Fürkauff, und derhalben gemachte Geding, Vereinigung und Pact hinfüro verboten und abseyn, und die hinfüro niemands weder durch sich selbst noch andere trieben oder üben soll: Welche aber hierwider solches thun würden, dero Haab und Güther sollen confiscirt* an der Obrigkeit jeglichs Orts so peinliche Straff der Ends hat verfallen seyn, auch *dieselben Gesellschaften, Kauffleuth und Handthierer hinfüro durch kein Obrigkeit im Reich vergeleidet*, sie auch desselben nicht fähig seyn, mit was Worten, Meynung oder Clausul solche Geleydt gegeben werden."

Tit. XXXVI of the same *Polizeiordnung* of 1548 condemned all agreements of artisans as to prices.

¹ *Ordnung, Statuten und Edikt Keiser Carols des Fünfften*, publicirt in der namhafften Stat Brüssel, den 4. Octobris 1540, pp. 7 et seq.: "Item zu verhüten den schaden, kommende von *Monopoliën und unzimlichen Contracten, welche vil Kaufleut und Handtwercksleut machen und brauchen in unsern Niderlanden, zu nachteil andern guten und aufrichtigen Kaufleuten, Handtwercksleuten* und wider die gemeine wolfart, So habe wir geordinirt und statuirt, ordinieren und statuieren, das *kein Kauffman, Handtwercksman* oders andere jm vermesse zu *machen contract, pact oder vertrag, so sich den Monopoliën möchten vergleichen* und der gemeinen wolfart nachtheilig sein als *zu auffkauffen alle die wahren von einer Sort, und die unter jhnen zuhalten und darnach die zu verkauffen zu übertreflichen gewinn*, und dergleichen, bey peen

This edict expressly prohibited merchants, artisans, or *whomsoever* (*oder andere jm*) to enter into *contracts, pacts, and agreements tantamounting to monopolies and harming the common welfare through purchasing goods of a given kind, hoarding them, and later selling at an extravagant profit, or by any other similar method*. The same restriction was applicable to all towns, parishes, *corporations of merchants* (*Collegien von Kauffleuten*), associations of artisans, or fraternities and *all others* (*allen anderen*) who were not allowed to make *statutes amounting to monopolies* (*einige Statuten, Ordnung, gleich den Monopoliën*)! All older statutes of this kind were rendered void and the authorities in the various States had to take care that the edict was obeyed in practice. This demonstrates how widespread it was in those days. The legal sanction attached to those provisions was, as in other countries, the confiscation of the whole property and forfeiture of the right to trade.

The Netherlandish edict of Charles V against monopolies is, for the history of the cartel movement, particularly valuable. The cartel character of the old monopolies is reflected therein with such exceptional clearness, and so obviously, as in no other law of that time. It distinctly refers to the buying up and hoarding of goods as the methods most frequently applied by unions of merchants and artisans (producers) seeking to obtain a monopoly on the market.

verlierung irer gütern und kauffmanschaft also erkaufft, und über das willkürliche gestraft. Verbieten *allen Stetten Gemeinden, Collegien von Kaufleuten, Consulenten und Supposten Geselschafften von Handtwerckern oder Bruderschafften, und allen anderen*, zu machen einige Statuten, Ordnung, *gleich den Monopoliën*, zu nachteil der gemeinen wolfart. Thun auch zu nichtigen und aboliren alle dergleichen Ordnung, so vormals gemacht seyn, als krafftlos und unwerdig, on verhindernus einicher confirmation General oder Special, hierauf zu wegen gebracht. Befehlen den Presidenten und Leuten von unsern Höffen und Lantss Räthen, das, wann man vor jm will procediren oder exhibiren solche Statuten, Ordnung und Edict, die zu declariren als nichtig und krafftloss. Und überdiß sollen willkürlich zu straffen sein die, so die vorgeschribne Statuten exhibiren oder sustiniren, herfür bringen oder dulden."

Further, the statement that the same monopolistic policy had been pursued by municipal associations, towns, and parishes, trade unions, guilds of merchants and artisans, and fraternities, is of special value.

Finally, it is characteristic that the Netherlandish edict having, like all other anti-monopolistic laws, pointed out in a general way that its aim is the common welfare, emphasized at the same time the necessity of protecting non-combined merchants and artisans.¹ Likewise the modern cartel legislation lays special stress upon the necessity of protection for outsiders and, consequently, for open competition.

Nearly thirty years later, the *Reichspolizeyordnung*, which was promulgated in *Frankfort* in 1577, and which is an almost literal repetition of the *Reichspolizeyordnung* of Augsburg of 1548, admitted that the situation *had not changed and that the monopoly movement was spreading as before*.² Evidently this was ascribed to some extent to the negligence of the authorities. It was therefore decided, as in the constitution of the emperor Zeno,³ that any authority neglecting to carry out the duty of prosecuting monopoly offenders became liable to a fine of one hundred gold marks imposed by the Imperial Court. To facilitate the discovery of the culprits by the authorities, the *Reichspolizeyordnung* of 1577 provided that any reliable informant would be rewarded with a quarter of the forfeited fortune of the guilty persons. An accomplice in the formation of a monopoly, on informing the authorities of its existence before it had been officially discovered, secured for himself exemption from punishment, though he did not receive any reward.

The above-described German laws comprise *all* monopolies, i.e. those formed independently by *individual entrepreneurs*

¹ Cf. the first sentence of the edict, cited on p. 181, note 1.

² *Polizey-Ordnung zu Franckfurt anno 1777 gebessert*, Tit. XVIII, §§ 7-9, pp. 856 et seq.

³ See p. 111 et seq., ante.

as well as those originating in *agreements*. The latter were *combines of entrepreneurs* taking the *shape of trading companies*. Both types were rightly treated alike and no material distinction was drawn between them, in accordance with the fully adopted conception of the Roman legislation against monopolies. It was immaterial to the German legislator, just as it was to the Roman, whether an individual or group of persons organized a monopoly, the essential thing was its intrinsic nature: *the engrossment of a certain merchandise*. Being directed against *monopoly companies* ("*Gesellschaft, Vereinigung, Pact*") these laws *ipso facto* included also all modern cartels. Professor Strieder correctly remarked that in the legislation of the sixteenth century directed against monopolies, cartels were also included.¹

The legislation against monopolies in France developed simultaneously along the same lines. Numerous royal *ordonnances* in the early decades of the sixteenth century form a continuation of the previous policy in this matter. Among others, the *ordonnances* of Francis I in 1531 opposed in a particularly severe manner the unceasing corn monopolies, branding them almost in the same words as Diocletian did in his memorable edict more than twelve hundred years earlier,²

¹ STRIEDER, *Studien zur Geschichte* . . ., ut sup., p. 184: "*Wenn sich die offizielle Gesetzgebung des 16. Jahrhunderts—übrigens, wie wir sahen, ohne Erfolg und an den massgebenden, führenden Stellen auch ohne wirklichen Ernst—gegen die Monopole wandte, so verstand sie darunter auch die Kartelle mit.*"

² *Ordonnance of Francis I, of 28th October, 1531*: "*Comme nous avons esté avertis et informés que plusieurs personnages, par avarice et rapacité, non ayans Dieu, charité et le salut de leurs âmes devant leurs yeux, ont acheté grande quantité de tous blés, les uns devant la cueillette et estant encore en verdure sur les champs, et les autres du populaire hors du marché et en leurs maisons pour mettre en granier, pour eux vendre à leur plaisir et volonté, lorsqu'ils verront le peuple estre en nécessité; à cause de quoy, ainsi que notoirement se peut voir et connoistre, le blé s'est enchéri grandement et le peuple en a grande faute à notre grand regret et déplaisir. . . .*"

Cf. quotation from the edict of Diocletian, p. 108, note 2, ante.

or, as one sometimes reads in modern newspaper articles against monopolies and trusts.

Later *ordonnances* of Francis I, of 1539, forbade merchants and other persons to form monopolies of victuals and other goods, or *conventicles* and frauds detrimental to the community.¹ In the same year, 1539, or somewhat later, Francis I took like measures against analogous monopoly organizations formed by craft-guilds. The masters of guilds were strictly forbidden to form monopolies and generally to found any congregations, make assemblies or mutual agreements regarding their common craft, under the penalty of confiscation of their property.² This decree, which was the only one of its kind before the ultimate dissolution of the guilds by the Constituent Assembly in 1791, actually placed the guilds on a level with the monopolies as illicit unions. But, nevertheless, these survived until the close of the eighteenth century.³

In the year 1544, Francis I renewed the prohibitions to form corn monopolies, which were then occurring more and more frequently. They came into existence owing to the buying up of corn, both harvested and while still growing. The statement that these monopolies increased in number, as before, despite the good harvest and the great abundance of corn (*grand abondance*) and that this was not the consequence of the corn being in insufficient quantity on the market, is valuable,

¹ *Ordonnance of Francis I, of 20th June, 1539*: "Défendons à tous marchands et autres de commettre au fait de viures et marchandises aucuns monopoles, conventicules ou fraudes au préjudice de nous et de la chose publique, ni autrement contrevenir ni exeder en tout ce et les dépendances, à ce qui appartient à gens de bien loyaux et fidellés, et ce que le vray estat des marchandises veut et requiert."

² *Ordonnance of Francis I, of August 1539*: "Défendons à tous les maîtres, ensemble aux compagnons et serviteurs de tous métiers, faire aucunes congregations ou assemblées grandes ou petites, ni pour quelque cause ou occasion que ce soit, ni fair aucuns monopoles, et n'avoir ou prendre aucune intelligence les uns avec les autres du fait de leurs métiers, sur peine de confiscation de corps et de biens."

³ BABLED, *Les syndicats de producteurs et détenteurs de marchandises*, Paris, 1892, pp. 122 et seq.

the latter belief being erroneously held to-day.¹ The testimony of DE LA MARE corroborates this statement. He views the French *Ordonnances* against corn monopolies in the first instance, in the light of his contemporaneous circumstances (first half of the eighteenth century).² He states that in France corn merchants, exactly as in ancient Greece and Rome, had since the earliest days always been making mutual agreements, forming companies, and holding "conventicles," in order to hide the superabundance of corn and obtain higher prices (*en cacher l'abondance et en faire monter les prix*). De la Mare compares his contemporaneous French legislation unreservedly with the older French, Roman, and Greek laws; all are identical, as they combat the same monopolistic organizations. Finally, this writer declares that the same situation, both in the realm of law and facts, existed at that time in other countries of Europe.³

¹ *Ordonnance of Francis I, of 6th November, 1544*: ". . . Comme par diverses Ordonnances, Statuts et Edicts de nos Predecesseurs et Nous, et le bien commun de nos Sujets, soit expressément défendu à tous Marchands et autres personnes quelconques, d'acheter blez en verd, vendre et debiter, ny acheter aucuns blez ny autres grains ailleurs que és marcher publics de nostre Royaume: Toutesfois cela a esté si mal observé depuis aucun temps en ça, que pour ce jourd'huy encore que d'aucunes sortes de grains y ait esté amenée (graces à Dieu) assez grande abondance, l'on en voit et connoist évidemment les prix si excessivement haussez, que cela fait certaine et oculaire preuve des fautes et fraudes en ce commises, à cause desquelles nos Sujets en plusieurs estats sont de ce tellement grevez et offensez, que ceux qui ont quelque patrimoine et revenue n'en sçauroient vivre, encore moins les Artisans et menu-peuple du labour de leur mains, par ce moyen contraints hausser et augmenter les salaires et prix accoustumez de leur ouvrages, vacations et peines."

² DE LA MARE, *Traité de la Police*, Paris, 1710, Vol. II, l. V, Tit. XIV, Chap. II, pp. 944 et seq.: "*Des malversations qui se commettent dans le commerce des grains pour en joire paroistre la disette et en augmenter les prix.*" See also pp. 656 et seq., 687, and 703 et seq.

³ DE LA MARE, ut sup., Vol. II, p. 950: "Ce vice de l'usure ou monopole dans le commerce des grains s'est fait sentir dans toutes les autres parties de l'Europe, et y a toujours esté sévèrement puni. La France n'en a pas esté exempte, il en est fait mention dans les Capitulaires de nos premiers Rois."

The *ordonnance* of Francis I of 1544 declared further that, owing to the dearness caused by corn monopolies, artisans and labourers had also entered into agreements tending to increase their earnings. To prevent this state of affairs the penal sanctions were made more severe and the competent authorities were commanded to prosecute rigidly all monopolistic organizations. In the year 1566, the *crimes de coalitions* (monopolies) *et d'accaparement* were reckoned among the *cas royaux*, as particularly important cases.¹

The monopoly movement, however, did not decline. Monopolistic companies of merchants in the various branches of commerce (not solely in the corn trade!) became more general, and as before it was their aim to limit the supply and secure thereby better prices. This is expressly confirmed by the later Edict of Louis XIV, 1676, directed against monopolies.² De la Mare states that as corn cartels so all other cartels were formed with the intention of doing away with the abundance of goods in the market and securing better prices.

Numerous other *Ordonnances royaux*, decisions of the Parliament, and decrees of the Prefect of Police in Paris were, in the sixteenth and seventeenth centuries, combating mono-

¹ *Arrêts* of June 1, 1556, and October 10, 1661.

² DE LA MARE, ut sup., pp. 659 sqq. *L'Edit du mois Décembre 1672. Registré au Parlement le vingtième Fevrier 1673 . . . donné au Public en 1676.* Art. XI. "Pour empêcher le monopole et les mauvaises pratiques d'aucuns Marchands, qui pour causer disette, et augmenter le prix des marchandises s'entendent ensemble sous prétexte de societez, et affectent de ne point faire charger et voiturier en cette Ville, celles qu'ils ont extantes sur les ports et chetées dans les Provinces, defenses sont faites à tous Marchands de contracter telles societez, sous peine de punition corporelle, et pourront les Prevosts des Marchands et Echevins, en cas de besoin, faire voiturier lesdites marchandises en cette Ville, aux frais de la chose, pour estre venues au Public, ou octroyer permission à autres Marchands, de les faire voiturier pour leur compte, aux soumissions de rembourser par eux les propriétaires, du soumissions de rembourser par eux les propriétaires, du prix de leurs marchandises." In this connection Art. XXIII of the Edict combated especially the *buying up* of goods.

polies directly or indirectly (through maximum tariffs, etc.), but without success.¹

The legislation against monopolies in England presents in the sixteenth century the same picture. It is a continuation of the former laws in this matter. In order to prevent the formation of monopolies (*ingrossing* and *regrating*) in the victual trade the statute of Henry VIII, of 1533, renewed the maximum tariffs, long before ineffectively applied.² The authorities were given power to set victual prices: their violation was punished as before with forfeiture of goods and fines. Compared with the old statutes, a very notable change took place in the statute of 1533. For the first time the idea of a price raised "*without ground or cause reasonable*" had been introduced. Only such prices had then to be suppressed, and not, as heretofore, *any* raising of the market prices.

As the old monopolistic buying up method still persisted in the wine trade, special statutes regulated wine prices in a number of instances.³

¹ In particular *Ordonnances* of Charles IX of February 4, 1567; Henry III of November 21 and 27, 1577; Louis XIII of January 18, 1629. *Arrests du Parlement* of May 2, 1542; July 20, 1546; June 1, 1566; September 18, 1590; December 23, 1660; and July 13, 1662. *Ordonnances de Police du Chatelet de Paris* of November 23, 1546; January 8, 1662; October 6, 1632; November 12, 1671; and February 11, 1698. These are quoted and commented upon by DE LA MARE, *ut sup.*, Vol. II, pp. 656 et seq., and 703 et seq.

² Statutes made at Westminster, Anno 25 Henrici VIII, and A.D. 1533, Cap. II, *Proclamations for the Prices of Victuals*. . . . This Statute admits at the outset that "it is very hard and difficult to put certain prices to *any such things*," but this is necessary owing to the fact that "Prices of such Victuals be many times inanced and raised by the greedy Covetousness and Appetites of the Owners of such Victuals, by occasion of *ingrossing and regrating* the same, more than upon *any reasonable or just ground or cause*, to the great damage and impoverishing of the King's subjects."

³ Statutes made at Westminster, Anno 28 Henrici VIII, and A.D. 1536, Cap. XIV, *For Prices of Wines; The Act to avoid the excessive Prices of Wine*, Anno septimo Edwardi VI, A.D. 1553, Cap. V; Act made Anno 12 Caroli II, A.D. 1660, Cap. XXV.

A Statute of Edward VI in the year 1548¹ took very severe measures against conspiracies and collusions of victual traders, who mutually agreed not to sell their goods below an unfairly high price (cartels based on a price agreement, *Preiskartelle*). Likewise conspiracies, *confederacies* of artisans and labourers who bound themselves under oath not to compete with one another, not to meddle in the work of the other, not to complete the work started by another, and to keep to the working hours arranged, were condemned.

If such conspiracies were entered into by any licensed trading company or association of merchants or artisans, its members were punished and the company or association dissolved.² In connection with this, the statute guaranteed to all subjects a full protection, which had already been observed for a long time, for free and unlimited execution of any craft in England. Any encroachment on this liberty was also punished by fines.³

¹ *The bill of conspiracies of victuallers and craftsmen*, anno 2 et 3 Edwardi VI, A.D. 1548, Cap. XV, para. 1.

"Forasmuch as of late divers sellers of victuals, not contented with moderate and reasonable gain, but minding to have and to take for their victuals so much as list them, *have conspired and covenanted together* to sell their victuals at unreasonable prices.

"*And likewise artificers, handicraftsmen and labourers have made confederacies and promises, and have sworn mutual oaths* not only that they should not meddle with one another's work, and perform and finish that another hath begun, but also to constitute and appoint how much work they shall do in a day, and what hours and times they shall work, *contrary to the laws and statutes of this realm, and to the great hurt and impoverishment of the King's Majesty's subjects.*"

² *Statute Edw. VI of 1548*, Cap. XV, para. II: "And if it fortune any such conspiracy, covenant or promise to be had and made by any *society, brotherhood or company of any craft, mystery or occupation of the victuallers* above mentioned, with the presence or consent of the more part of them, that then immediately upon such *act of conspiracy*, covenant or promise had or made, over and besides the particular punishment before in this act appointed for the offender, their corporation shall be dissolved to all intents, constructions and purposes."

³ *Ut sup.*, Cap. XV, para. IV: ". . . and that Pain of Forfeiture of five Pound for *every Interruption or Disturbance done contrary to this Statute.*"

All above-described monopolies and cartels of merchants, artisans, industrialists, and labourers were, as contrary to the law, threatened with severe penalties such as fines, confiscation of property, imprisonment, pillory, deprivation of one ear, infamy, aggravated in case of repeated commission of the offence.¹ The Courts were specially commanded to see to it that these statutes were observed.

Probably no great change occurred under its influence, since four years later Edward VI issued another anti-monopolistic statute. The new law states at the outset that the numerous statutes against *forestallers*, *regrators*, and *ingrossers* had not had the desired effect. It was explained to some extent by the insufficiently clear definition of the three types of monopolies in the statutes. To dispel any uncertainty, the statute gave a definition of forestallers, regrators, and ingrossers.² As *forestallers* are described those persons who

¹ *Statute Edw. VI* 1548, Cap. XV, para. I: "For reformation thereof it is ordained and enacted by the King . . . that if any butchers, brewers, bakers, poulterers, cooks, costermongers or fruiterers, shall at any time form and after the first day of March next coming, *conspire, covenant, promise or make any oath that they shall not sell their victuals but at certain prices, or if any artificers, workmen or labourers do conspire, covenant or promise together, or make any oaths, that they shall not enterprise or take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but certain hours and times*, that then every person so conspiring, covenanting, swearing or offending, being lawfully convict thereof by witness, confession or otherwise, shall forfeit for the first offence ten pounds to the King's highness; . . . or . . . twenty days' imprisonment and shall only have bread and water for his sustenance."

In case of a repetition of the offence, a fine of twenty pounds or "punishment of the pillory" was laid down. For the third offence a particularly severe penalty was provided: a fine of forty pounds or ". . . the offender shall sit on the pillory and lose one of his ears, and also shall at all times after that be taken as a man infamous, and his saying, depositions or oath not be credited at any time in any matters of judgment."

² *An Act against Regrators, Forestallers and Ingrossers*, Anno 5 and 6 Edwardi VI, A.D. 1552, Cap. XIV: "Albeit divers good statutes heretofore have been made against *forestallers* of merchandises and

act individually or collectively (*person or persons*), buy up any goods intended for the market, or who make mutual agreements, verbally, in writing, or in any other way with a view to increasing the selling price of these goods.¹

On the other hand, *regrators* were called those who were buying up corn and other victuals in order to resell them later at higher prices.² If in a locality which had to import food the necessary victuals were not available in its immediate neighbourhood, the wholesale purchase was allowed if the goods were not re-sold on a near market, within the radius of four miles of the place of original purchase.

Essentially both terms, *ingrossers* and *regrators*, were identical. The operations of ingrossers included also corn and other foodstuffs, but they had a somewhat more wholesale character

victuals yet for that good laws and statutes against *regrators* and *ingrossers* of the same things have not been heretofore sufficiently made and provided, and also for that it hath not been perfectly known what person should be taken for a forestaller, regrator or ingrosser, the said statutes have not taken good effect, according to the minds of the workers thereof."

¹ *An Act against Regrators*: "Therefore be it enacted and declared by the King . . . That whatsoever person or persons, that after the first day of May next coming shall buy or cause to be bought, any merchandise, victual or any other thing whatsoever, coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek or road of this realm or Wales, from any parts beyond the sea to be sold, . . . or shall make any motion by word, letter, message or otherwise, to any person or persons, for the inhancing of the price or dearer selling of any thing or things abovementioned, . . . shall be deemed, taken and adjudged a *forestaller*."

² Ut sup.: "Whatsoever person or persons . . . shall by any means regrate, obtain or get into his or their hands or possession, in any fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, . . . or other dead victual whatsoever, that shall be brought to any fair or market within this realm or Wales to be sold, and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be accepted, reputed and taken for a *regrator* or *regrators*."

and the statute reckoned among them also the standing crop.¹

Ingrossing and regrating revealed in the corn and victual trades exactly the same monopolistic tendencies which in the sphere of all others were realized by the *forestalling*. BLACKSTONE's definition that engrossing represented in the provision trade the same encroachment on the liberty of trading as monopolies expressed in other branches of trade is, therefore, not accurate.² Monopolies were a term of wider application embracing ingrossing, forestalling and regrating as *parallel methods* of committing the same monopoly offence. This clearly follows from the text of the statute, which never used the expression *monopoly* in connection with any of its particular kinds, although it condemned all monopolies and not merely referred to those of corn and victuals. Monopolies in other branches of trade were included in the term *forestallers*, denoting a group co-ordinate to *regrators* and *ingrossers*.

All three classes of offenders was accordingly threatened with the same punishment: imprisonment up to six months and forfeiture of goods, which was rendered more severe if the offence was repeated. For the third offence particularly painful methods were applied to enforce obedience to the law:

¹ *An Act against Regrators*: "Whatever person or persons, . . . shall ingross or get into his or their hands, by buying, contracting or promise-taking, other than by demise, grant, or lease of land or tithe, any corn, growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed and taken an unlawful *ingrosser* or *ingrossers*."

² BLACKSTONE, *Commentaries on the Laws of England*, London, 1813, Vol. IV, Chap. XII ("Of Offences against Public Trade"): "*Monopolies are much the same offence in other branches of trade, that engrossing is in provisions: being a licence or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.*" See also ELY, *Monopolies and Trusts*, New York, 1900, pp. 13 et seq. and 19.

putting into the pillory, forfeiture of movable property, and deprivation of liberty for an indefinite period.¹

Blackstone, on the other hand, pertinently compares the provisions of the Statutes of Edward VI in 1548 and 1552 to the analogous laws in Rome, in particular to the constitution of Zeno. Both were combating, according to him, *the same* monopolistic organizations which in his days (first half of the nineteenth century) manifested themselves in *the same* manner as in Ancient Rome.²

A special Statute of Edward VI, issued simultaneously with the one of the year 1552, discussed before, was directed solely against the monopoly organizations of dealers in tanned leather, which evidently were widespread in those days.³

¹ *Statutes 5 and 6 Edw. VI*, ut sup., Cap. XIV, para. VI: "... for the said third offence shall be set on the pillory in the city, town or place, where he shall then dwell and inhabit, and lose and forfeit all the goods and cattle that he or they have to their own use, and also be committed to prison, there to remain during the King's majesty's pleasure."

² BLACKSTONE, ut sup., pp. 144 et seq.: "The offence of *forestalling* the market is also an offence against public trade. This, which, as well as the two following (i.e. *regrating* and *engrossing*), is also an offence at common law, was described by statute 5 and 6 Edw. VI, Cap. XIV. . . .

"... Among the Romans these offences, and other mal-practices to raise the price of provisions, were punished by a pecuniary mulct. 'Poena viginti aureorum statuitur adversus eum, qui contra annonam fecerit, societatemve coierit quo annona carior fiat.'

"... Combinations also among victuallers or artificers, to raise the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; and, in general, by statute 2 and 3 Edw. VI, Cap. XV.

"... In the same manner, by a constitution of the emperor ZENO, all monopolies and combinations to keep up the price of merchandise, provisions, or workmanship, were prohibited upon pain of forfeiture of goods and perpetual banishment."

³ *An Act against Regrators and Ingrossers of Tanned Leather*, Anno 5 and 6 Edw. VI, A.D. 1552, Cap. XV.: "Where by the Covetousness of divers greedy Persons, regrating and engrossing all Kinds of Tanned Leather into their Hands, and selling the same again at excessive Prices to Sadlers, Girdlers, Cordwainers, and such other Artificers and

In order to protect the full industrial liberty of the individual, Edward VI opposed most decidedly, though with traditional ineffectiveness, any attempt to restrict free competition. But at the same time he knew, like his predecessors, how to eliminate or restrict foreign competition when it began to endanger the home industries. This was generally done with the aid of the old expedient of protective tariffs, and at times also by means of embargoes on imports. These protective measures, while damping down free competition with abroad, went much farther. This was rendered particularly conspicuous in the pewter trade, which flourished in the English towns and commanded foreign markets. But in the sixteenth century it began to decline owing to foreign competition, principally of German pewterers. The Statute of Henry VIII in the year 1533, which had to find a remedy for the troubles in this branch of industry, gave a characteristic explanation of its failure.

Lack of patriotism of the English pewterers was supposed to have evoked it. They were above all concerned with their own enrichment and emigrated into foreign countries, where they pursued their trade and acquainted foreigners with its secrets, who in turn became pernicious competitors of the English pewter industry.¹ Owing to the competition of the undoubtedly

Handicrafts-men as make Wares of Tanned Leather, the King's loving Subjects *are inforced to buy the said Wares at unreasonable Prices. . . .*

"*For Remedy*" it was peremptorily prohibited to enter into such agreements under penalty of confiscation of the whole stock of leather.

¹ *A Bill concerning Pewterers, Anno 25 Henrici VIII, A.D. 1533, Cap. IX, para. I:* ". . . the Craft and Mys'ery of the Pewterers, as well of the City of London, as of all other Places within this Realm of England, . . . before this time hath been one of the best Handicrafts within this Realm, which hath only grown and continued by means of divers good Acts and Statutes made for the true Exercise of the same, . . . which good Statutes, duly put in Execution, hath caused the said Craft to increase and multiply, to the great Profit and Utility of a great number of the King's Subjects, and the

cheaper foreign manufacture, pewter ware, especially vessels, which were previously much in demand, now exceeded the requirements and could not find a sale. Such a situation entailed the danger of a ruination of English pewterers and was detrimental to the royal treasury.¹

To free the English trade of this dangerous competition from abroad, the Statute of 1533 excluded all foreign pewter goods from the English market on pain of their confiscation² and branded them as of inferior quality.³ The master pewterers were given power to search, together with the State authorities

Commodity of Pewter Vessel much to be had in Reputation in all strange Regions and Countries until now of late divers evil disposed persons, being the King's Subjects born, which have been Apprentices, and brought up in the exercise of the said Craft of Pewterers, have now of late, for their singular Lucre, repaired into strange Regions and Countries, and there do exercise the said Craft of Pewterers, teaching Strangers not only the cunning of mixing and forging of all manner of pewter Vessel, but also do teach all things belonging to the said Craft of Pewterers, by means *whereof there is not only brought daily into this Realm, out of strange Regions, to be sold, great number of things made of Pewter, untruly mixed, and made of Tin, wherewith the King's Subjects be daily deceived. . . .*"

¹ *A Bill concerning Pewterers*: ". . . whereby the Commodity of Tin, made into Pewter Vessels which hath been had in great Estimation, as things very necessary and commodious, and the King's Customs thereby much advanced, is now like utterly undone, and a great multitude of the King's natural Subjects thereby fall into Idleness, to the great Impoverishment of this Realm, if speedy Remedy for the Redress of the Premises be not provided."

² *Ut sup.*: ". . . *That no person or persons hereafter, at any time now inhabiting, or which hereafter shall inhabit within this Realm, shall buy, or otherwise take by Exchange for other Wares, any manner Wares made, or hereafter to be made out of this Realm, of Tin, or mixt with Tin, as Platters, . . . Spoons, or any other thing made of Tin or Pewter, as aforesaid, whatsoever it be, upon pain of Forfeiture of the same Ware, in whose hands soever it may be found or taken, and also lawful Money current in this Realm, to the full value thereof, the one half of the same Forfeiture to be to the use of the King's Highness, the other half to be to the use of the Finders of the same.*"

³ Cf. citation in note 1, in fine, on pp. 194-195. Incidentally, one cannot help thinking of the *origin* of the mark "*Made in Germany*" which has to be affixed to-day to goods imported into England.

and with the assistance of experts, for pewter of foreign origin and to confiscate it if found, regardless as to whether it was in the possession of merchants or other persons.¹ English pewterers were further forbidden under heavy fines to employ foreigners. The latter could not work on their own account in England, the penal sanctions being similar: fines and confiscation of the whole stock.²

By its hostility towards free competition the statute of the year 1533 resembled the anti-Turkish policy of the Papal alum cartel of 1470 and the famous Apostolic letters condemning the heathen alum to the interest of the alum cartel, because the former was cheaper and marketable.³ In the year 1541 Henry VIII issued a new pewter statute which was an almost literal repetition of the Statute of 1533.⁴ Evidently the competition of foreign pewter had not stopped. Its reasons were far deeper rooted than those represented by the Statutes of

¹ *A Bill concerning Pewterers*, para. 2 of the Statute: "... That it shall be lawfull to the Master and Wardens of the said Craft of Pewterers, as well within the City of London, as within every other City, . . . and where no such Wardens be, to the head Officer or Governor, . . . to appoint divers persons most expert in Knowledge of the same, to make Search and Seizure, and to take into their Hands and Possessions all such Wares as hereafter shall be brought contrary to the true intent and effect of this present Act, in whose soever Hands or Possession any such shall be found."

² Ut sup., para. 3 of the Statute: "... That no person or persons occupying the said Craft or Occupation of Pewterers within this Realm, shall set on work, or retain in his or their Service, any person or persons, to be his or their Apprentice and Journeyman, being Stranger born out of this Realm. . . ." The penal sanction follows.

"... And that no Stranger born out of this Realm, shall occupy exercise, or use, . . . the said craft of Pewterers . . . within any place or places of this Realm. . . ." Followed by the penal sanction.

³ Ut sup., para. 4 of the Statute: "... That no person or persons being born within this Realm, occupying or exercising the said Craft of Pewterers, shall at any time hereafter resort into any strange Regions or Countries, there to use, teach, or exercise the said Craft of Pewterers, upon pain to lose the Privilege and Benefit of an English-man."

⁴ Ut sup., para. 5 of the Statute.

Henry VIII. Similarly, as the outlet for English pewter ware shrank owing to increased production and inland competition, forcing pewterers to emigrate and seek earnings abroad, so, and even in a higher degree, the pewter trade on the Continent, especially in Germany, had to fight for the market and a betterment of the situation. This branch of industry flourished in the sixteenth century in Saxony and northern Bohemia quite independently of the English pewterer-emigrants. It developed also more rapidly and on a larger scale than that in England. Consequently, the competition was more acute on the Continent than in England. It had been reflected in the animated cartel movement in this branch of industry in Germany, hence their pewter expanded on the English market more widely than the English make on the Continent.

Along with a far-reaching protectionism applied to the competition of foreign tin, English kings made use at the same time of the monopoly organizations as regards the pewter trade of their own country. Significantly, even here the expansion of the German trade manifested itself from the very beginning. The earliest-known monopoly in the English pewter trade was secured in 1347 by Tidemann von Limberg, a Hansa merchant of Cologne. It was granted to him for Cornwall and Devonshire for the period of three years in return for the loan of £3,000, which he had made to Prince Edward.¹ The later monopolies in the pewter trade will be dealt with in another place.

The German expansion did not confine itself to the pewter trade only; it turned to many spheres of the English trade, and particularly to the mining industry. For instance, Professor EHRENBURG related that a certain Joachim Höchstetter, merchant of Augsburg and one of the pioneers of the monopoly (cartel) movement in Germany in the sixteenth century,

¹ HANSEN, "Der englische Staatskredit unter König Eduard III (1327-1377) und die hansischen Kaufleute," in *Hansische Geschichtsblätter*, 1910, No. 16, pp. 391 et seq.

received from the English king in 1528 the title of "*principal surveyor and master of all mines in England and Ireland.*" In this capacity he was able to exploit, jointly with six other Germans, and using one thousand workmen, the mining installation organized by him.¹

German expansion was at the same time noticeable in the mining industries of France² and other countries. Professor Strieder remarks that there was in the fifteenth and sixteenth centuries hardly a country in Europe without a considerable number of German industrialists and miners.³ These interests even reached overseas. The German firm of WELSERS, which gained by organizing cartels on a large scale in the sixteenth century a fame greater than that of the Höchstetters, brought under its influence the mines of precious metals in the American colonies of Spain and organized the emigration of German miners there.⁴

These circumstances were not taken into account by the Pewterers Statute of Henry VIII of 1533, which did not, therefore, find out the real causes of the stagnation in the English pewter trade in the sixteenth century.

The increasing monopoly movement compelled James I to issue in 1623 a new law against monopolies. It was once again ordained that all charters granting monopolies in industry or commerce to single persons or corporations are contrary to the law and therefore invalid.⁵ At the same time, however, certain

¹ EHRENBERG, *Hamburg und England im Zeitalter der Königin Elisabeth*, Jena, 1896, p. 5.

² IMBART DE LA TOUR, *Les origines de la Réforme*, Paris, 1905-1909, Vol. I, p. 232: "*En 1483, dans le Conserans, le personnel des mines et encore presque entièrement allemand.*"

³ STRIEDER, *ut sup.*, p. 41.

⁴ HÄBLER, *Die überseeischen Unternehmungen der Welser und ihre Gesellschaften*, Leipzig, 1903, pp. 61 et seq.

⁵ *An Act concerning Monopolies and Dispensations with penal Laws, and the Forfeitures thereof* (Anno vicesimo primo JACOBI Regis, A.D. 1623, Cap. III).

"(4) . . . all Monopolies, and all Commissions, Grants, Licences,

exceptions were retained, of which the most important were as follows:—

1. "Provided nevertheless, and be it declared and enacted, That any Declaration beforementioned, shall not extend to any Letters Patents and Grants of Privilege for the Term of one and twenty Years, or under, heretofore made of the sole Working or Making of any Manner of *new Manufacture* within this Realm, to the *first true Inventor or Inventors* of such Manufacturers, which others at the Time of the Making of such Letters Patents and Grants did not use, so they be not contrary to the Law, nor mischievous to the State, by *Raising of the Prices* of Commodities at home, or Hurt of Trade, or generally inconvenient. . . ."¹

2. "This Act or any Thing therein contained, shall not in any wise extend, or be prejudicial . . . unto any Corporations, Companies or Fellowships of *any Art*, Trade, Occupation or Mystery, or to *any Companies or Societies of Merchants* within this Realm, erected for the Maintenance, Enlargement, or *ordering of any Trade of Merchandise*; but that the same Charters, Customs, Corporations, Companies, Fellowships and Societies and their Liberties, Privileges, Powers and Immunities, *shall be and continue of such Force and Effect as they were before the Making of this Act, and of none other; any Thing before in this Act contained to the contrary in any wise notwithstanding.*"²

These two exceptions had, as we shall see later, obliterated the whole practical value of this Statute.

Apart from the above, the Statute made a number of other

Charters and Letters Patents heretofore made or granted, or hereafter to be made or granted to any Person or Persons, Bodies Politick or Corporate whatsoever, of, or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm . . . or of any other Monopolies, or of Power, Liberty or Faculty . . . *are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none effect and in no wise to be put in Execution.*"

¹ Section 5 of the Statute.

² Section 9 of the Statute.

exceptions of less importance. They referred either to special branches of industry¹ or to certain towns or persons retaining older monopoly charters in force.²

A much larger gap in the principle of free competition were, as before, the numerous Statutes restricting or even eliminating foreign competition whenever it began to endanger any branch of English industry or commerce.³

¹ Section 10 of the Statute: "... of, for, or concerning *Printing, . . . the Digging, Making or Compounding of Salt-petre or Gunpowder; Or the Casting or Making of Ordnance, or Shot for Ordnance. . . .*"

Section 11 of the Statute: "... concerning the *Digging, Compounding or Making of Allum or Allummines. . . .*"

² Section 13 of the Statute: "... concerning the Making of Glass, by his Majesty's Letters Patents, under the Great Seal of England, . . . made and granted to Sir Robert Mansel, Knight, Vice-Admiral of England: (2) Nor to a Grant or Letters Patents . . . made to James Maxwell, Esquire, concerning the Transportation of Calveskins. . . ."

Section 14 of the Statute: "... concerning the Making of Smalt, by his Majesty's Letters Patents under the Great Seal of England, . . . made or granted to Abraham Baker. . . ."

In Sections 12-14 are contained exceptions of a *local* nature made specially for several towns.

³ E.g. *An Act prohibiting the Importation of Foreign Bone-lace, Cut-work, Imbroidery, Fringe, Bandstrings, Buttons and Needlework* (Anno decimo tertio & quarto Caroli II Regis, A.D. 1662, Cap. XIII).

In the same Statute, Cap. XIX: "*An Act against importing of Foreign Wool-Cards, Card-Wyre, or Iron-Wyre.*"

An Act for prohibiting the Importation of all foreign Hair Buttons (Anno quarto Guilielmi & Mariae, A.D. 1692, Cap. X).

CHAPTER VI

The science and interpretation of the law against monopolies in the sixteenth and seventeenth centuries.—The theory of Malynes.—The attitude of public opinion.—The influences of the Christian economic ethics in the Middle Ages.—The theory of the “justum pretium.”—The views of Luther.—The anti-monopolistic legislation of the sixteenth and seventeenth centuries in the light of present cartel literature

THE science and interpretation of the anti-monopolistic law in the sixteenth century demonstrate beyond doubt that the *monopoly* offence of the period, which was invariably based on the adopted Roman law, comprised, apart from other ways of monopolizing the market, also all such combinations of merchants and producers as essentially correspond to present cartels.

The eminent criminologist of the Low Countries, JODOCUS DAMHOUDERIUS,¹ defines, in accordance with Aristotle and the

¹ DAMHOUDERIUS, *Praxis rerum criminalium*, Antwerpiae, 1562, pp. 383 et seq. (caput 132, “De monopolio”): “*Et aliud detestabile crimen, et nihilominus apud plerasque respublicas frequens et pene impunitum, quod monopolium vocatur: quasi singularis ac penes unum venditio. Est enim monopolium nihil aliud, quam quando penes unum aliquem aut paucos solos tota alicuius rei vendendae patestat est, haec quam sit in re publica perniciosa, quantumque communi plebeculae detrimenti adferat, vel hinc manifestum est, quod ex eo rerum omnium caritas in rempublicam ilico erumpat.*

“*. . . Monopolium committitur: Qui comestibilia omnia in foro emunt, ut ea post carius pro suo arbitrio divendant.*

“*Qui quaevis usibus nostris necessaria passim emunt, ut pro suo arbitratu postea divendant.*

“*Qui impediunt, ne victualia, aut aliae res ad forum pervebantur.*

“*Qui in caritate annonae civitatem frumento spoliant, idque alio auferunt.*

“*Opifices qui per clancularias et iniquas inter se constitutiones rempublicam gravant.*

“*Medici, chirurgi, laniones, pistores, aenopole, etc., per clancularia et iniqua inter se pacta.*”

Roman law, the essence of the monopoly offence as the exclusive control over the sale of a certain commodity exercised by one or more persons, which control effects a dearness of the article to the detriment of the community. Then he enumerates by way of example a number of *ways* how this offence had been actually perpetrated. Among these he mentions several times the buying up of goods and the interception of their conveyance to the market, together with the *mutual secret agreements* made between merchants, bakers, butchers, brewers, and the like; also between artisans, even between physicians and surgeons, all of whom aim at an increase of the natural market price of certain goods or services. Damhouderius, in accordance with the law of the time, does not differentiate between persons who become the *subject* of the monopoly offence; they might be merchants, producers, artisans, manual, or non-manual workers of every description whose occupations and services were of public utility. He also consistently does not make any reservations as to the *object* of this offence. In fact, any merchandise, anything either superfluous or indispensable in everyday use (*alle comestibilia ac potabilia*), as well as the services mentioned, may become the object of this offence.

It is obvious from the exposition of Damhouderius that the essential mark of a monopoly is not the buying up of a certain commodity for the purpose of temporarily reducing its supply and obtaining a quick sale at the highest possible price, but the gaining of a *complete control of the sale of some thing (tota alicuius rei vendendae potestas)*; and the reaching, through a systematic domination of the market, a certain state that cannot be considered as a mere purchase for sporadic speculation only. Such an absorption of goods must be carried out according to a plan and must exert its influence over a long period, if it ensures a complete control of the sale of a certain merchandise. Buying up conceived in this way is placed by Damhouderius on the same plane with the group of those various *secret understandings* of merchants, producers, artisans,

and so on. They are for him but two instruments by which monopolization is enforced. By their very nature they most frequently go together, especially in cases when the monopoly has been formed by merchants. The fact that he reduced these two ways of perpetrating the monopoly offence to one common denominator, viz. *the monopolization of the sale*, best elucidates the essential points of the buying up of goods.

The secret agreements between merchants and artisans as to the price of goods or services respectively, of which Damhouderius speaks, have such a distinct cartel character in the modern significance of the term that even some opponents of the identification of the old monopolistic organizations with the modern cartels, for instance, Isay, admit that they were really *cartel agreements*.¹

Another eminent jurist of the sixteenth century, the Italian criminologist Tiberius Decianus,² after analysing the factors in monopolistic organizations, arrived at the same conclusions as the Dutch writer. Going back to the oldest monopolies, as described by Aristotle, Decianus represents the monopoly as the exclusive control of the sale of a thing (*alicuius rei vendendae potestas*), a control obtained through the operation of a pact or agreement between the interested merchants or artisans.³

Decianus also states that in his days, notwithstanding the numerous penal prohibitions, the same monopoly organizations sprang up in every possible field of economic activity. Further, he recalls the clauses in ZENO'S constitution as being in force in the Italian States.⁴

¹ ISAY, *Die Entwicklung der Kartellgesetzgebungen*, ut sup., p. 10.

² DECIANUS, *Tractatus criminalis*, Francofurt ad Moenum, 1591, pp. 187 et seq., Lib. VII, Cap. XXI, "De Monopoliis."

³ DECIANUS, ut sup., p. 187: "Monopolium dicitur, cum penes unum tantum *alicuius rei vendendae potestas est*, quod simul cum omnibus pactis ad monopolium inducendum factis, prohibitum est, grave certè delictum, et odiosum, atque reipublicae maximè incommodum. . . ." Then he refers, *inter alia*, to the above-described (pp. 91 sqq.) exposition of Aristotle on monopolies.

⁴ DECIANUS, ut sup., p. 188, para. 5.

In the many species of the monopoly offence Decianus includes agreements between merchants not to sell a commodity or commodities below an agreed price.¹ (Another typical instance of the modern price-fixing cartels!)

Subsequently he refers to analogous cases when artisans monopolistically concurred as to the terms and prices of their services. He brands these as a special kind of a monopoly and particularly mentions such cases as artisans mutually deciding not to teach their craft to anyone but their sons and grandsons, or not to teach below a certain price or within a shorter period than three years.² Thus these characteristic specimens of the monopoly offence reflect in no small degree the monopolistic tendencies in the craft-guilds.³

After having enumerated a few more groups of monopolistic organizations, Decianus states that these are only illustrative because the monopoly offence comprises all such *conventions* that are made in order to obtain some advantage for private persons to the prejudice of the community.⁴

Monopolists in the sixteenth century were punished as in Roman days, not only with confiscation of property, but also with lifelong banishment. Further, heavy fines were imposed on the principals of corporations, whether or not such mono-

¹ DECIANUS, ut sup., p. 188: "Monopolium autem committunt, qui emunt vestes, pisces, aut aliam quampiam speciem ad vitam pertinentur, ut soli vendant."

"*Item qui illicitis conventionibus coniurant, aut paciscuntur, ut species diversorum corporum negotiationis, non minoris quam inter se convenerint veniuntur.*"

² DECIANUS, ut sup., p. 188: "*Item monopolium committunt artifices, si paciantur inter se, ne quisdam eorum in illa arte alios instruat, praeter filios vel nepotes eorum.*"

"*. . . Pariter si artifices convenirent, quod nemo doceret artem, nisi tanto precio, vel non minori tempore quam per tres annos, cum tamen minori possent.*"

³ This matter will be considered in the chapter on guilds on p. 168 et seq.

⁴ DECIANUS, ut sup., p. 188: "Non solum enim dicitur fieri monopolium in casibus enumeratis, . . . sed etiam in qualibet alia illicita conventionione ad damnum publicum, et quaestum privatum."

polies were formed owing to their negligence or otherwise. Similarly to the constitution of Zeno the judge who neglected either to impose or enforce those penalties¹ was heavily fined.

Relying on the Roman legislation since the *lex Julia de annona*, Decianus treats as separate group all monopolies of corn and other foodstuffs, and designates the offenders *dardanarii*.²

In their expositions both Damhouderius and Decianus refer to the numerous earlier and contemporaneous writers, who in the same manner interpreted the monopoly offence. Such was in the sixteenth century the current opinion on monopolies in the science. These forms of monopolies included also modern cartel forms. In fact it was a consistent continuation of the economic and legal views of the Romans, and that again was based on the conception which in the fourth century B.C. was represented by Aristotle, so far as we know, the earliest author on this subject.

In accordance with Decianus the essence of monopolistic combinations and of the monopoly offence was interpreted by a later Italian jurist and philosopher, JULIUS PACIUS.³ The title alone of one chapter of his book, "*De monopoliiis, et conventu negotiatorum illicito, vel artificum, ergolaborumque, nec non balneatorum prohibitis illicitisque pactionibus*," indicates that in the seventeenth century nothing had been changed either in the monopoly movement or its legislation. Evidently the Roman legal construction, immortalized in the constitution of Zeno,

¹ DECIANUS, ut sup., p. 189: "Poenae autem monopolii sunt publicatio bonorum, et perpetuum exilium, . . . praesidentes autem collegiis, in quibus tales illicitae pactiones factae fuerint, 40. lib. auri mulctantur. Et iudex, qui has poenas neglexerit imponere vel exigere, 50. lib. auri punitur."

² DECIANUS, ut sup., p. 190. Cf. also pp. 100 et seq., ante.

³ PACIUS, *Isagogicorum* . . ., Amsterdam, 1647, pp. 438 et seq., Cap. LVIII, "De monopoliiis."

P. 439: "Mercatorum inter se conventio ne merces viliori pretio vendant, quam communi ipsorum consensu statutum sit. Obiter eadem constitutione prohibentur illicitae pactiones artificum, . . . veluti ne quis opus ab altero inchoatum absolvat."

was then as opportune as it was upwards of a thousand years before.

In the same manner SIGISMUNDUS SCACCIA comments upon the monopoly offence. Particularly valuable for the perception of the essence of the monopoly is his likening of the private monopoly *de facto*, which was prosecuted by the law, to the public monopoly granted by the king and sanctioned by the law. When comparing these two types of monopolies, Scaccia, like to Aristotle, regards them as materially equivalent and different in form only. The monopoly of public law is valid and permitted, because it is based on a grant of the authority and as such it is advantageous to the public. Whereas the private monopoly which does not enjoy official support is invalid and is punished as a crime injurious to the community.¹

According to Scaccia, not only the actual organizers and members of a monopoly were guilty, but also all those who knowingly entered into the contract of sale of goods at a monopolistic price.² The principle that only by way of exception were buyers (consumers) suffered to form monopolies in self-defence against monopolies that exploited them was in no small degree a consequence of this legal view. Scaccia distinctly states that such monopolies are allowed, because *force may be repelled by force*. Such a consumers' cartel consisted, according to Scaccia, in a mutual agreement to boycott

¹ SCACCIA, *Tractatus de commerciis et cambio*, Francofurti ad Moenum, 1648, Chap. X, p. 299: "Monopolium ita est damnabile in cambio, quod faciunt ii, qui monopolium committunt, sicut in cambio, quod faciunt alii, qui scienter contrahunt sub eodem pretio, per monopolium inducto."

"... *Monopolium, quod fit auctoritate Principis, est licitum, quia tendit ad utilitatem publicam.*"

On pp. 300 et seq., Scaccia unfolds the principles expressed above. There he states that members of private monopolies fortified monopolistic agreements by oath: "*Iurata fide constituunt ut nullus eorum nisi tanti vendat.*"

² SCACCIA, ut sup., p. 299: "Monopolium committunt venditores et quandoque emptores."

the exorbitant prices of the monopoly and not to buy the given goods at more than a jointly arranged price.¹

From this it will be seen that the idea of our present associations of consumers in the form of co-operatives or the like, as an instrument of defence against a monopolistic dictatorship of cartels and trusts, is also not a novelty of our days.

The essence of monopoly was analogously interpreted in the German science. Its construction was based on the contemporaneous legislation which also rested on the Roman law. It was emphasized that monopolistic organizations had a cartel character. Thus, for instance, SCHUSTER, when commenting upon the law which the Reichstag at Augsburg, 1548, issued against monopolies,² says that those who restrict freedom of trade by means of *conventions, pacts, and conspiracies*, wherein they undertake not to buy above or sell below a fixed price, are guilty of monopoly.³ These monopolistic conventions *not to buy above a mutually agreed price* coincide with present purchase cartels (e.g. of manufacturers for the purchase of raw materials, etc.). Thus the latter were also in remote times.

English writers understood the essence of monopoly concordantly with the science in Continental Europe. It was owned that all anti-monopolistic laws of those days derived from the Roman legislation, which again took after Greek models. And so MISSELDEN does not hesitate to place together monopolies of the seventeenth century with those described

¹ SCACCIA, ut sup., p. 300: "*Quando vero venditores monopolium facerent, tunc juste emptores, quasi vim vi repellentes, possent convenire inter se, ut nullus, nisi certo pretio emeret.*" Likewise, in the synopsis given in the title of Chapter X, he says: "*Monopolium contra monopolium non est illicitum!*"

² SCHUSTER, *Dissertatio iuridica in pragmaticum imp. rom. germ. sanctionem de monopoliiis ad tit. XVII reformationis politicae de anno 1548*, Giessen, 1686, pp. 18 sqq.

³ SCHUSTER, ut sup., p. 18: ". . . Plures alii, qui licet non directe, per obliquum tamen privati compendii ergo commerciorum libertatem restringunt, variis conventionibus, pactis ac collusionibus, videlicet de non emendo vendendove ultra vel infra certum pretium."

by Aristotle!¹ He even quotes both examples of Aristotle: the iron monopoly of the banker of Syracuse and the monopoly of Thales. Restraint of the liberty of a given trade brought about by its concentration in the hands of a few persons or even one person only and the dictation of an arbitrary price to the private benefit of the monopolists and the prejudice of the community, these are the most essential traits of every monopoly.²

Of the many English writers who agree with Misselden,³ special attention must be drawn to MALYNES, who is almost unknown in the present cartel and trust literature. His unusually interesting and original construction of monopoly deserves all the more careful attention, as Malynes was a merchant and gathered his observations from personal experience and did not base them merely on theory.

Malynes wrote several times on monopolies; the first time, in 1603, he described them as assemblies of merchants, artificers, or labourers formed with a view to setting prices on goods or services; alongside of these he mentioned as equivalent individual monopolies secured by single persons through the buying up of goods with the view of selling them later at a price fixed at will.⁴ As the constitution of Zeno, so Malynes saw no

¹ MISSELDEN, *Free Trade*, London, 1622, 2nd ed., pp. 53 sqq. (Chap. III on monopolies). On p. 57 he gives a definition of monopoly as accepted by the science of the period and states: "The restraint of the liberty of Commerce to some one or few: and the setting of the price at the pleasure of the Monopolium to his private benefit, and the prejudice of the publique. Upon which two hinges every Monopoly turneth."

² Cf. citation in preceding note.

³ Some of them (e.g. PARKER, *Of a Free Trade* . . ., London, 1648) differed only therein that they did not condemn all monopolies; they exempted certain monopolies based on charters, especially the companies of *Merchant Adventurers*, as useful and desirable for the development of trade. This is comprehensively treated in Chapter X, pp. 285 et seq.

⁴ MALYNES, *England's View in the Unmasking of Two Paradoxes*, London, 1603, p. 82: ". . . when merchants, artificers, or labourers do assemble themselves to set a price upon Commodities, which one

reason why monopolistic unions of labourers should be treated differently from similar unions of entrepreneurs. Labour is in his opinion a commodity in the market, as is any other merchandise or service.

Engrossing, forestalling, and a monopolization of a certain merchandise (which he calls *incorporating*) by a corporation (cartel) on the strength of a charter are in the opinion of Malynes equally harmful to the general welfare; but he adds that they are justified if such an "*incorporation*," i.e. our cartel (trust *sensu largo*), could save a trade from decay.¹ This idea is unfolded in his later work, *Consuetudo vel Lex Mercatoria*. The essence of monopoly is construed there in accord with the Roman law to which he refers. He divides monopolies into three groups:

First: "*Reasonable (scil. monopolies)*, of such things and trifles as are for pleasure, as Starch, Cards, Lute-strings, Tobacco, and such like."

Second: "*Unreasonable*, as of Flesh, Fish, Butter, Cheese, or needfull things for the sustenance of man, without which he can hardly live civilly."

Third: "*Indifferent*, as of Velvets, Silkes, Sugar, Spices, and other delicacies and dainties or curiosities, indifferent to be used or not."² An interesting picture of the requirements of life in England at that time.

All these monopolies were either based on Letters Patent of the ("authoritie") of princes or the State granted for a limited term of years or depended solely on the enterprising spirit ("authoritie") of private persons. Malynes declared that the

man alone may also count when he buyeth up all, that is to be had of one kind of merchandize, to the end he alone may sell the same at his pleasure."

¹ MALYNES, ut sup., p. 82: "The engrossing, forestalling, or *incorporating* of any Commodities or victuals, is intollerable in any Commonwealth, *unlesse that the trade of those Commodities would decay, if a kind of incorporation were not used!*"

² MALYNES, *Consuetudo vel Lex Mercatoria* . . ., London, 1662, p. 213.

latter group "*is commendable, to keepe commodities in reputation to maintaine a trade thereby; . . . otherwise when abundance of a commoditie doth so much abate the price of it, that Merchants do become losers and discouraged, then the trafficke and trade is thereby overthrowne, to the generall hurt of the commonwealth. In which respect it is better to pay somewhat more for commodities, than to have them altogether over cheape.*"¹

These strictly private and useful monopolies to which Malynes gave the name *Engrossing* were formed "*when men of meanes do engrosse and buy up a commoditie, and for reasonable gaine they sell the same againe to shopkeepers and retailers; this is much used amongst Merchants of all nations.*"²

To these private and useful monopolies Malynes opposes private monopolies which are harmful to the public welfare, and calls the latter "*forestalling*" and the actors "*forestallers*" and "*regrators*"; their economic content and effects coincide with the above-mentioned "*unreasonable monopolies*" granted by the prince. They are exercised chiefly in the provision trade and create a dearness of the "*commodities for the bellie.*" Laws are directed only against this kind of monopolies; in Rome they were combated as a "*Dardanariat*" noxious to the community.³

All these monopolies were formed either by single persons or by companies, i.e. when several merchants controlled a whole trade (our cartels and trusts).⁴ Company monopolies were, as

¹ MALYNES, ut sup., p. 213. Malynes adds that this is important "*especially for commodities serving for the backe, and not for the bellie.*"

² MALYNES, ut sup.

³ MALYNES, ut sup., p. 213: "Forestalling or Forestallers called by the Civilians *Dardanary*. . . . Against which kind of people (Regrators and others) there are verie good lawes made, which the magistrates are to see observed."

⁴ MALYNES, ut sup.: "*An Association, Companie, or Societie may become a Monopolie in effect; when some few Merchants have the whole managing of the trade to the hurt of a common-wealth, when other Merchants are excluded to negotiate with their stocks. . . . And so this is done many times by one Merchant, for one kind of com-*

stated by Malynes in his definition, more common than single ones.¹

He speaks only of monopolies of *merchants* as these were the rule. Apart from guilds, producers themselves only exceptionally formed monopolies for the sale of their products. Normally the whole production was passed over to wholesale merchants who undertook the distribution. Indirectly, through special agreements with producers made when the "contracts of sale" (*Kauf, Aufkauf*) were concluded, they adapted frequently the quantities of production to the marketing possibilities, and being the sole buyers they fixed the quantities of goods which were to be bought up every year. In these circumstances it did not lie in the interests of the manufacturers to produce more than the share allotted to each one of them. If in exceptional cases producers had their own selling agencies they were, with regard to those agencies, usually called "merchant traders." Hence Malynes and other earlier authors refer only to monopolies of merchants.

As we see, the construction of commercial monopolies by Malynes exactly tallies with the present one and in some respects even surpasses it. The analogous seemingly "modern" division of cartels into defensive and aggressive ones (*Syndicats de défense industrielle et commerciale; sindacati di difesa industriale e commerciale; Schutzkartelle*),² which identically to Malynes justifies and considers as useful cartels formed in

moditie (bee it Corne, Salt, Oyle, Woolles, and the like): So may it bee done by a Societe of Merchants continually, under the colour of authoritie."

¹ MALYNES, ut sup., p. 214: "The truest definition of a Monopoly therefore is, A kind of commerce in buying, selling, changing, or bartering, *usurped by a few, and sometimes, but by one person.*"

² BABLED, *Les syndicats de producteurs et detenteurs de marchandises* . . ., Paris, 1892, pp. 16 et seq. and pp. 44 et seq.; MARGHERI, *Sindacati di difesa industriale*, ut sup., pp. 305 et seq.; RAMELLA, *Trattato della proprieta industriale*, Roma, 1909, II, p. 488: "Sindacati industriali o commerciali liceti o di difesa"; MENZEL, *Die wirtschaftlichen Kartelle* . . ., ut sup., p. 25.

times of trade depression to safeguard the existence of a certain branch of trade, falsely contends that they are not monopolistic. Malynes does not fall into this inconsistency, but clearly and unequivocally states that all these combinations are monopolistic; some of them are useful and should not, therefore, be punished. Their *objects*, however, may be *different*. The logic of his remarks and the perspicacity of his observations on monopolies is striking. In this respect at least Malynes considerably surpasses some modern writers in the cartel literature, which literally swarms with most elaborate absurdities on this simple and clear subject.

The unearthing of the expositions of Malynes is to my mind important both for the history of the monopoly movement and the history of economics in general. It gives the lie to many unfounded theories (especially those of Sombart and Lehnich, and also others), asserting that formerly *demand exceeded supply*, and that later so-called *modern capitalism* (*der moderne Kapitalismus*) brought about over-production and a speculation on a fall, a consequence of which are modern cartels. All these occurrences are said to have been formerly (also in the days of Malynes) unknown. Hence the theory of the essential difference between old cartels (monopolies) which took advantage of the fact that demand could not be adequately met, and modern cartels which are combating over-production!¹ The disclosures of Malynes blow these theories to pieces like a house of cards.

Here also Malynes is far above many contemporaneous theorists although he was only a merchant. When stating that there existed unions of entrepreneurs for the production of the various branches of commerce threatened by over-production he does not treat them as something new and does not embark on guessing that such unions did not exist before. On the contrary, he says that they existed at all times wherever there was commerce.

¹ Cf. pp. 98 et seq., ante.

Among the known writers to whom we owe our information of the history of the old monopoly movement after Aristotle there is not one more important than Malynes. Up to his era there was not much added to Aristotle's observations. Malynes is the first to develop the science on monopolies in a "modern" fashion. His merit is all the greater that he dispersed false notions in the present science about old conditions.

But it was not solely the science which so comprehended and defined the nature of the monopoly offence. So it was also understood by the general public. This is shown in the numerous public sermons on morality preached during this period, and in particular in the characteristic sermon of GEILER OF KAISERBERG (sometimes cited in the cartel bibliography) on "How a Merchant Ought to Be."¹

Geiler, in this sermon, considers private monopolies as economically equivalent to monopolies granted by the king or duke. The latter monopolies, which gave to its holders the sole right to sell a certain commodity, he designates as *lawful*. These he contrasts with *other monopolists, who are not the sole vendors* ("die nit ein Ding wellend allein verkaufen"), but operate in conjunction with other monopolists and make secret agreements as to the selling price and fix a minimum below which they would not give away the goods ("aber sie stupfen mit einander umb das gelt (de precio), wie sie es geben wellend, also und anders nit") and take oath to adhere to the agreed price.² Therefore

¹ PAULIN, *Die brösamlin doct. Keiserspergs* . . ., Strassburg, 1517, pp. lxxxvii et seq. Keiserspergs Predig "Wie ein Kauffman soll sein standthafft Kauffmans."

² PAULIN, ut sup., p. xcvi: "Die ersten heissen Monopoli, die da ein Was allein feil hond und haben wellen, und über semlichs. So erwerben sie ein freiheit Brief und Siegel von eim Fürsten im land oder von eim König. Das seind die rechten Monopoli, die ein ding allein verkaufen wellen. Die anderen Monopoli seind, die mit ein ding wellend allein verkaufen, aber sie stupfen mit einander umb das gelt (de precio), wie sie es geben wellend, also und anders nit; und die monopoli heisse ich stupfer, als da sie etwan miteinander stupfen. . . . Also stupfen dise, die war also æ geben und nit anders bei seinem Eid . . . sie stupfen

nobody under such monopolistic control could buy an ell of cloth or anything else at less than the price dictated by the monopolists. These were allowed to charge a higher price, but never a lower one.¹

At the same time Geiler stated that the monopoly movement spread with equal force among artisans, whether *organized in craft-guilds* or not. Thus, when speaking on the monopolistic combinations of bath-keepers and barbers, Geiler directly refers to the constitution of Zeno, which combated among other institutions also these classes of monopolists.² This again is a proof of the direct and clear connection between the monopolistic combinations of that time and the old Roman monopolies.

Geiler rightly remarks that the secret understandings of monopolists still remain monopolies, even if the prices they put up are not too extravagant. According to him, they are always harmful, because they suppress free enterprise. He therefore sees no material (i.e. economic) difference between punishable and lawful monopolies, and condemns both as equally harmful to trade. Further, he brands all monopolies as

numer zusammen, dass keiner ein ellenn des thuchs, oder was es ist, wölfer (i.e. wohlfeiler, more cheaply) gebe denn also; er mag es wol türer geben, aber nit wölfer."

¹ Cf. citation in conclusion of preceding note.

² PAULIN, ut sup., p. xciv: "*Die IIII. Monopoli seien die bader und die scherer, die ein statut machen und stupfen zesammen niemans zu baden noch zu scheren denn eben umb ein semlich gelt; das soll nit sein. Es ist unrecht, es stot als im text keiserlichs rechten De balneatoribus. Die V. stupfen. Das sein die murer und zimmerleut; die stupfen zesammen. Wenn einer ein werck angefahet so gethar das werck keiner ausmachen. Es sol keiner dem andern in sein werk gonn. Darum wen einer eim ein werck verdingt hat, so macht er ein gerüst dar; so hat er an eim andern ort auch ein gerüst, und also werdent biderleut umb getriben, wan keiner gethar dem andern in sein werck ston, das er angefangen hat.*" Analogous facts of monopolistic agreements between artisans were embodied in the constitution of Zeno (cf. pp. 111 et seq.).

Geiler enumerates also other groups of similar monopolies of artisans.

deadly sins, because they are, indeed, highly immoral and contrary to the Christian ethics and teachings.¹

Being based on the idea of securing to everybody a uniform standard of living suitable to his status, the Christian economic morality pervading the Christian world during the Middle Ages and the sixteenth century considerably hampered a faster development not only of the cartel movement but also of all capitalistic ideas at large.²

In order to prevent people from enriching themselves too much by trading, the Church constantly advocated the principle of the "*just price*" (*justum pretium*), known already in the Roman law. According to the teachings of the canonists³ a fair price had three degrees, i.e. the lowest price, or kind price (*pretium infimum seu pium*), below which the goods could not be bought righteously; the medium or moderate price (*pretium medium seu moderatum*); and the highest or rigorous price (*pretium supremum seu rigorosum*), above which the goods could not be righteously and justly sold. A price higher than these three was looked upon as infamous profit (*turpe lucrum*), as usury.⁴ All these three prices, especially the two last, were equal to the *natural* market prices, as formed under unrestricted competition.

In the science there is the current belief that the *just price*

¹ PAULIN, ut sup., pp. xcvi et seq.: ". . . Das semlich Monopolii und stupferei ist wider das vernünfftig gesatz. . . Also thunt sie wider das natürlich gesatz, und darnach wider das geschriben gesatz, darumb so sprechen die lerer das es todsünd sei."

² MAURENBRECHER, *Thomas von Aquinas Stellung zum Wirtschaftsleben seiner Zeit*, Leipzig, 1898.

³ MOLINA LODOVICUS, *De iure et iustitia*, Vol. II, "De contractibus," Disputatio 347, "*De pretio justo*."

⁴ NEUMANN, *Geschichte des Wuchers in Deutschland bis zur Begründung der heutigen Zinsgesetze* (1654), Halle, 1865. On p. 91 and following he shows that in the Middle Ages not only he who lent money on interest was styled as usurer, but also the merchant who did not adhere to the *just price*. Cf. also MÖLLENBERG, *Die Eroberung des Weltmarkts durch das mansfeldische Kupfer*, Gotha, 1911, pp. 60 et seq.

was not a market price, but that fixed by the public authority. This is not accurate.¹ Maximum tariffs which the authorities set up for goods, especially victuals, did not create new prices; as a rule they rather tended to maintain the old competitive prices which monopolistic organizations had put up. The maximum tariffs only protected the market prices formed under free competition and which were considered as *just*; and therefore they necessarily coincided with those prices. They cannot be represented as antithetic to market prices. A classical proof that the market price was not affected by the tariff price is the famous edict of Diocletian of A.D. 301. This fixed the prices of all the more important goods, yet at the same time retaining *lower market prices* in certain provinces in which goods were cheaper owing to a larger supply. The rates in the Edict were founded on the natural, usually somewhat higher prices prevailing in Rome.

In the doctrine of "*the just price*," aided by the *brachium saeculare* of the State, the monopolistic organizations which by an elimination of competition aimed at a profit increment and advance in the market price, or at least prevention of its natural decline, met a particularly difficult obstacle.

The case of "the just price" was taken up also by LUTHER, who opposed monopolies as well as exorbitant profits in trade.²

¹ ENDEMANN, *Studien in der romanisch-kanonistischen Wirtschafts- und Rechtslehre*, Berlin, 1874, Vol. II, pp. 34 et seq. On p. 38 he regards the fixing of prices by the public authority as the source of the *just price*. Says he: "Der kürzeste (*scil.* Weg) war der, dass die hierzu zweifellos berufene Obrigkeit den Preis legal fixirte. In dem *pretium legitimum* hatte man unmittelbar das *pretium justum*."

Similarly LEADAM, in the Introduction to *The Court of Star Chamber*, Seden Society, London, 1911, Vol. II, p. 39: "What that *justum pretium* might be was determinable by *communis aestimatio*, which was not the market price, but the value set upon the commodity by the public authority."

Likewise W. J. ASHLEY, *An Introduction to English Economic History and Theory*, London, 1892, 2nd ed., pp. 133 et seq.

² LUTHER MARTINUS, *Von Kauffshandlung und Wucher*, Wittenberg, 1524: ". . . Es sollt nicht so heissen, ich mag meine Waar so theur

He described more closely what is to be understood by a just price. According to him the selling price of goods should depend not on the free discretion of the merchants who sell, but on equitable factors, viz. it has to be founded on real cost, labour, trouble, and risk of the merchant. Any other price is not only contrary to Christian love, but also repugnant to the law of nature. Monopolies in trade, he thinks, endanger the maintenance of such a just price much more than usurious speculations of individual merchants. Mercantile monopolies he clearly identifies with the buying up of goods (*auffkauff*).¹

The comprehensive expositions of Luther, resembling as they do the motivation of the edict of Diocletian and the opposition to-day against the policy of cartels and trusts, are dealt with by ISAY in his latest work on cartels. He remarks that *this exposition of Luther reads almost like a commentary on the decree against exorbitant prices proclaimed in 1918*.² If one considers, however, that the prices in Germany were then, as to-day, mostly dictated by cartels, there is no difficulty in discerning the striking analogy of the conditions in the sixteenth century with those in the cartel movement of to-day. In fact, it is so obvious that even an author like Isay, who

geben als ich kann oder will; sondern also: Ich mag meine Waar so theur geben als ich soll, oder, als recht und billig ist. Darumb musst du dir fursetzen, nichts denn deine ziemliche Nahrunge zu suchen inn solchen Handel, darnach *Kost, Muhe, Arbeit und Fahr rechnen* und überschlahen, und also denn die Waar selbst setzen, steigern oder niedern, dass du solcher Arbeit und Muhe Lohn davon habest."

¹ LUTHER, ut sup.: ". . . Viel gewlicher ist das, das man darauff eyn gut *alleyn auffkaufft*, wilchs auch die Keyserlichen und weltlichen Rechte verbieten, und heysens *Monopolia*, das sind Eygennützige keuffe, die ynn landen und stedten gar nicht su leiden sind. Und Fürtsen und Herren sollten solches weren und straffen, wenn sie yhr Ampt wollten volfüren. Denn solche Kauffleut thun gerade, alls weren die Creaturen und güter Gottes alleyn für sie geschaffen und geben alls möchtin sie die selben den andern nehmen und setzen, nach yhrem mutwillen."

² ISAY, *Entwicklung der Kartellgesetzgebungen* . . ., ut sup., p. 11: "Die oben zieterte Darlegung Luthers liest sich *fast wie ein Kommentar zur Preistreibereiverordnung von 1918*."

maintained that the anti-monopolistic law of the sixteenth century did not appertain to cartels, had to accept the analogy.¹

Both anti-monopolistic legislation of the sixteenth century and its contemporaneous interpretation afford ample proof that the law was pre-eminently directed against the monopolistic unions of merchants and producers, known to-day as *cartels*. But in spite of such evidence the modern authorities on cartels most categorically exclude such a possibility. Hardly a few authors voiced opposite views. At the moment I am not concerned with those authors, who without mentioning the sixteenth-century laws against monopolies expressed, merely indirectly and generally, their views that the present cartel and trust movements go back to Roman or even remoter days. The views of those comparatively few writers have been represented in former chapters.²

First among the writers to discuss the anti-monopolistic laws of the sixteenth century was Professor MARTIN SAINT LÉON. He held the opinion that they comprised (he speaks only of German laws) the cartels (*price-syndicates*) of producers and merchants that at that time were widespread in Germany.³ This opinion of Martin is the more valuable for us because he is an author representing the viewpoint of the modernity of the cartel movement.⁴ It is a pity that although he took into account the conditions in France and England, Martin did not notice that in other countries the anti-monopolistic legisla-

¹ Cf. p. 228, note 3, post.

² In particular in Chapters I, II, and III.

³ MARTIN ST. LÉON, *Cartels et trusts*, Paris, 1903, 2nd ed., p. 37: "Dès le XVI^e siècle, il existait en Allemagne des *syndicats de producteurs et de marchands* formés dans le but d'amener le renchérissement des marchandises. Ces associations déclarées illicites par des édits impériaux de 1512, 1524, 1532, et des ordonnances de 1548 et 1577, imposaient à l'acheteur l'obligation de ne jamais acheter ou revendre à d'autres qu'à eux; leurs membres s'engageaient en outre à ne pas céder leurs produits au-dessous d'un certain prix."

⁴ Martin is here again at variance with his own theory on the origin of cartels; cf. p. 122 et seq, ante.

tion was also then the same, and, further, that all countries in Western Europe faithfully continued to operate upon the same unchanged principles of Roman law.

More attention to the German anti-monopolistic laws was, however, given by Professor Strieder, who also stated unreservedly that they were similar to the Roman law distinctly directed against cartels.¹ He also refers to the sermon of GEILER OF KAISERBERG as one of the proofs that cartels were common in Germany in the sixteenth century.²

The anti-cartel character of the legislation against monopolies in the sixteenth century was more strongly emphasized by HENDERSON, who compares the famous Sherman Act against trusts of 1890 with the Statute of Edward VI against *regrators*, *forestallers*, and *ingrossers* of 1552.³ Furthermore, of the two Acts he considers that owing to its exceptionally precise definitions, the Statute of 1552 is a much more highly developed piece of legislation and that "*it would do credit to any modern legislative drafting service*. He regrets that the Sherman Law did

¹ STRIEDER, *Studien* . . . , ut sup., p. 158: "*Ebenso deutlich wie das römische Recht sprechen verschiedene Reichstagsabschiede des 16. Jahrhunderts das Kartellierungsverbot aus.*"

And also *ibid.*, pp. 184 and 192. Cf. also citation on p. 184, note 1, and on p. 179, note 3, ante.

² STRIEDER, ut sup., p. 189: "Schon ausseinen (*scil.* of Geiler von Kaiserberg) Ausführungen dürfte zur Genüge ersichtlich sein, dass Kartelle eine häufige Erscheinung des 16. Jahrhunderts waren Erscheinungen, die trotz der Heimlichkeit, mit der die Kaufleute dabei zu verfahren pflegten, doch auch der breiten Öffentlichkeit nicht entgingen." Cf. pp. 179 sqq., ante.

³ HENDERSON, *The Federal Trade Commission*, New Haven, 1924, p. 3: "When it became necessary to define and punish the type of offenses against which the Sherman Law was directed, the more technical words '*forestalling, regrating, and engrossing*' were used. In the Statute against Forestallers, Regrators, and Ingrossers, these offenses are defined with a precision and detail that are quite astonishing. Indeed this Act, passed in the year 1552, is, from the juristic viewpoint, a much more highly developed product than the Sherman Act of 1890. In its technical aspects it would do credit to any modern legislative drafting service."

not follow this *excellent model*, instead of using less exact and clear terms, such as "*monopoly*" and "*restraint of trade*."¹

Recently HASLAM likens the medieval anti-monopolistic statutes of England to the modern anti-trust laws.²

And lastly, the strongest evidence in favour of the anti-cartel character of the legislation directed against monopolies in the sixteenth century, stronger even than the considered opinions of scientists, because it represents the practical aspect, is the famous judgment of the Supreme Court of the United States of May 15, 1911, in the case of the *American trust, Standard Oil Company of New Jersey*. This Court in its judgment explains the origin of the Sherman Anti-trust Law and the significance of the term "*monopoly*," as used in this law. *Inter alia*, it refers specifically to the definition of *engrossing*, contained in the Statute of Edward VI in 1552, as being illustrative of those monopolies which Sherman was opposing.³ The Court correctly identified the old "*engrossing*" with monopolies, as represented by present-day trusts and cartels.

But these few voices, which showed the anti-monopolistic laws of the sixteenth century in their true light, were drowned

¹ HENDERSON, *ut sup.*, p. 3: "*Instead of following this excellent model, and describing in simple and yet precise terms the conduct which they wished to forbid, the draftsmen of the Sherman Law chose instead to couch their prohibitions in terms of monopoly and restraint of trade.*"

² HASLAM, *The Law Relating to Trade Combinations*, London, 1931, p. 9: "*The anti-trust legislation, which is a prominent feature of several modern legal systems, had its counterpart in the statute book of medieval England.*"

³ *Federal Anti-Trust Decisions, Cases decided in United States Courts*, Vol. IV, Washington, 1912, pp. 120 et seq. On p. 123 the Supreme Court says in its decision: "*This is illustrated by the definition of engrossing found in the statute 5 and 6 Edw. VI, Ch. 14. . . .*" This is followed by a citation of the respective paragraph of the Statute. (This Statute I am citing on p. 190.) The judgment will be discussed later on p. 361. Cf. also p. 144, ante.

in the ocean of public opinion which, assuming beforehand that cartels and trusts are a modern phenomenon, passed over in silence all older anti-monopolistic laws, as being directed against *rings* only and, therefore, having nothing in common with modern cartels. Hardly any exponent of the general opinion thought it advisable to call attention to the laws against monopolies in the sixteenth century, if only to show that they did not appertain to cartels.

BABLED was the first to investigate more closely the medieval and later anti-monopolistic laws in France and, *inter alia*, he examined the royal *Ordonnances* of the sixteenth century.¹ In his opinion they combated, similarly to all earlier and later anti-monopolistic laws, merely a speculative buying up of goods (*accaparement*) formed by individuals or unions of traders for the purpose of the monopolization of the market and the dictation of exorbitant prices. The cartels of producers (*syndicats de producteurs*), on the other hand, were aimed at the protection of their industrial interests, and as such they are a modern phenomenon not known in those times.² His own mistaken opinion Babled refutes later by admitting that to-day there exist numerous syndicates not for the protection of the industrial interests of their members, but to attack competitors and consumers, just like earlier monopolies. The former he calls *syndicats de défense industrielle et commerciale*, the latter he places along with the old *accaparements* and gives them the name of *accaparement collectif ou coalition*, or *syndicats de coalition*. These two co-ordinate groups make use of the same organization forms.³

Again, in another place Babled justly remarks that industrial syndicates are not a novelty of our times, but rather a modernized edition of the old merchant and craft guilds and corporations,

¹ BABLED, *Les syndicats de producteurs et détenteurs de marchandises*, Paris, 1892, pp. 115 et seq.

² BABLED, ut sup., pp. 3 et seq. and 115 et seq.

³ BABLED, ut sup., pp. 131, 16 et seq., and 45 et seq. Cf. pp. 84 et seq., ante.

and that *these very* syndicates may have the object of a single co-operation or speculation.¹ But only the latter are in the sense of article 419 of the *Code pénal*² liable to prosecution as *délit collectif d'accaparement*.

From the exposition of Babled it is evident that our contemporaneous cartels are not a novelty but a continuation of the old monopoly organizations to which a new purpose, foreign to older cartels, was added, i.e. the co-operation and protection of industrial interests of producers and merchants brought under the cartel. Yet the history of the cartels in the sixteenth century and earlier proves also that this purpose is not new and was known with older cartels, as well as it is to-day. The records of both older and modern cartels convince us that there is no concrete and stable line of demarcation between protective and aggressive cartels. As a rule, every cartel is, by its very nature, to some extent protective and to some extent aggressive, and the boundary between these elements (defence—aggression) changes constantly under varying economic conditions. Thus all older laws against monopolies and article 419 of the *Code pénal*, which is modelled after them, proceeded against *all* cartels, both economically useful and harmful.

Similarly KEEL tries to prove that the German anti-monopoly laws in the sixteenth century appertained only to *speculative rings*, but inconsistently goes on to say that they were also directed against cartels.³

In the recent literature LEHNICH controverts STRIEDER and maintains that the legislation in the sixteenth century was primarily directed against *unions of usurers* (?) and monopolists. Cartels only, therefore, came under the same regulations

¹ BABLED, ut sup., pp. 3 and 151 et seq. Cf. p. 84, ante.

² BABLED, ut sup., p. 151: "L'article 419 ne prohibe nullement les premiers, il ne vise que les seconds." On p. 131: "*Délit individuel ou délit collectif d'accaparement tombe en France sous le coups de l'article 419 du Code pénal.*"

³ KEEL, ut sup., pp. 72 et seq.

because *formally the same facts occurred and no distinction was made with regard to economic effects.*¹

In order that the arguments of Professor Lehnich be better understood, it might as well be noted that he belongs to those authors who, contrary to the prevailing opinion, maintain that a *monopolistic* control or regulation of the market is not the essential purpose of cartels.² Even if we set aside the question as to whether the prevailing opinion on the monopolistic tendencies of cartels and trusts is right, Lehnich's assertion does not stand the test.

Besides monopolistic combinations Lehnich mentions some agreements between usurers (*Wuchervereinbarungen*) which he does not further define anywhere. They never existed as organizations distinct from monopolistic unions. Under the influence of the teachings of the Church on "*iustum pretium*," all monopolistic organizations which exceeded the just price were then reproached with practising usury. The same is, however, done to-day with regard to cartels and trusts, although the principle of the just price lost its force long ago. The reproach of practising usury commonly made to old monopolistic organizations cannot be considered as adequate criterion to distinguish them from the present monopolistic cartels and trusts.

The argument that cartels fell only *formally* within the scope of the anti-monopolistic laws, because *there were formally the same facts*, and the different economic effects were not taken into account, is also falling through. Neither past nor present monopolies (cartels) are tied to any special external *form*, for they are *economic unions, and not legal ones*; and as such they could not merely formally coincide. Cartels were subjected to the laws of the sixteenth and earlier centuries not because of their outward shape, which was untangible then as it is to-day, but because of their essence wherein they corre-

¹ LEHNICH, *Kartelle und Staat*, ut sup., p. 20.

² LEHNICH, ut sup., pp. 41 et seq.

sponded to other monopolies. By this they were in practice recognized and judged. The quintessence remained invariably the same: a monopolization of the market in a higher or less degree, so far as possible.

Lehnich's attempt to prove that the anti-monopolistic legislation of the sixteenth century did not appertain to cartels is undoubtedly a logical sequel of his above-described main thesis that cartels originate much later as a result of a preponderance of supply over demand, as opposed to old monopolies which are a consequence of an excessive demand.¹ In order to uphold this thesis Lehnich was bent on a conformable interpretation of everything that in history and life spoke against it, thus making further mistakes.

Again, in a different way, Professor PAYEN in the French literature tried to contrast medieval and later commercial monopolies with modern cartels. These monopolies were in France, just as in other countries, almost invariably assuming the form of systematically repeated purchases of a given merchandise, styled *accaparement*. They exactly correspond to their contemporaneous German *Fürkauf*, *Aufkauf*, or *Kauf*, and English *engrossing*. French law and the science of the period identified such buying up with monopolies. Likewise later the French Academy classed as a monopoly wholesale purchases of goods made by a merchant or several merchants combined (cartel) to gain control of the market and put up prices.²

¹ Cf. p. 98, ante.

² *Dictionnaire de l'Académie Française* (ed. 1878): "*Monopole* trafic exclusif fait en vertu d'un privilège. Il se vit par extension du trafic d'un ou de plusieurs marchands réunis qui achètent quelques marchandises en si grandes quantités que ceux qui veulent s'en procurer sont obligés de s'adresser à eux et de payer le prix qu'ils exigent."

Similarly BABLED (cf. pp. 221 et seq., ante) and other French writers use the term *accaparement* to denote older monopolies.

See also DOLLÉANS, *De l'accaparement*, Paris, 1902, pp. 8 et seq.: "Il y a un lien étroit entre l'idée d'accaparement et l'idée de monopole. On peut même dire qu'il y a synonymie entre les deux mots. Les

Payen questions such a definition of the monopolistic buying up of goods and maintains that such a purchase is something entirely different from a monopoly, and again a monopoly differs from industrial cartels. According to Payen an *accaparement* is always merely a commercial speculation dependent upon the will of the individual; a monopoly, however, is a permanent form of organizing production and sale.¹ This view coincides with the theory current in Germany on *speculative rings*, including under this term all earlier monopolistic purchases of goods both by individuals and unions of merchants (cartels). But the French writer goes much farther in that he emphatically denies the monopolistic character to all those wholesale purchases.

Payen's theory is first contradicted by the French legislation of the sixteenth century, which, in harmony with the legal position in other countries, combated, as before, together with monopolies, *any* buying up of goods. Such was the conformable interpretation of these purchases by the theory of that time and later. The practice also serves as a witness against Payen. It shows in all countries the lasting existence of monopolies of traders based on systematically repeated wholesale purchases of certain goods. It was difficult then, as it still is, to foresee which purchase will fail or for some other reason will be only ephemeral, and which will ensure its originators a lasting monopoly in the market. Thus *any* form of buying up that bore the stamp of a monopoly had always been opposed. Further, a differentiation between a temporary and permanent monopoly would in practice be immaterial, as the legislation not only in the sixteenth century but at all times and in all places proceeded in conformity with Roman law, not solely

économistes ont indiqué cette parenté. Dans presque toutes les définitions, on s'est servi de l'idée de monopole pour expliquer le mot accaparement."

¹ PAYEN, *Les monopoles*, Paris, 1920, pp. 2 et seq.: "*L'accaparement est une chose, le monopole une autre. . . . L'accaparement est un mode de spéculation; le monopole est un mode de production et de vente.*"

against a monopoly when actually formed, but even against the mere *attempt* to form one. Naturally offenders were proceeded against only when the operations betrayed monopolistic tendencies and tended to restrict free trade and so lead to either a complete or partial control of the market. And such purchases were so regarded by the French Academy when identifying them with monopolies.

When contrasting monopolies with modern cartels, Payen, though he accepts the erroneous theory held by an insignificant minority of writers that cartels do not aim at a monopolization of the market,¹ nevertheless advances no new arguments to support his theory.

Waldeck touches upon the German *Reichsabschiede* in the sixteenth century and admits that the monopolies opposed by the laws correspond to modern cartels. At the same time he divorces them as being different things, without, however, adducing any reasons. Like the majority of writers, he appears to be hypnotized by the current theory that cartels are something entirely novel, not known in older times.²

Recently, in the newest cartel literature, ISAY deals with the laws of the sixteenth century in Germany and other countries and takes up a similar standpoint as Lehnich. Although he acknowledges the existence of cartels at that time, he says that they were *rather uncommon*; and that, therefore, the anti-monopolistic laws were directed not against cartels but in the first instance against the speculative purchases of goods for the purpose of creating their dearness.³

¹ Cf. pp. 224 et seq., ante.

² WALDECK, *Deutsches und internationales Kartellrecht*, Berlin, 1922, p. 1 et seq. Cf. note 1 on p. 121, ante.

³ ISAY, *Die Entwicklung . . .*, ut sup., p. 10: "Wie sich schon aus dem Wortlaut der deutschen, französischen und englischen Bestimmungen ergibt, richten sie sich nicht in erster Linie gegen Kartelle, die ja auch in damaliger Zeit noch ziemlich selten vorkamen. Was sie verdammen, sind vor allem die Versuche, durch spekulative Aufkäufe der Ware eine Teuerung herbeizuführen, sowie die dazu gebräuchlicherweise angewandten Mittel."

Apparently Isay, similarly to Lehnich, was misled by the German anti-monopolistic law terms: *Fürkauf*, *Aufkauf*, and *Kauf*. He interprets these too literally and restrictively as meaning mere temporary speculative purchases. These terms, however, similarly to the English *forestalling* and *engrossing* and the French *accaparement*, in those days meant nothing less than a systematic, commonly applied means of monopolizing the market. To this means not only individual merchants and producers had recourse but also companies, i.e. cartels they had formed. Therefore the terms *Fürkauf*, *Aufkauf*, and *Kauf* were just as the English terms and the French *accaparement* used both in the legal practice and in legislation as synonyms for *monopoly*. If in the laws, especially those in Germany, emphasis was laid upon a particular *form* of monopolistic organization, it was just on their form as companies and agreements (*Gesellschaft*, *Vereinigung*, *Pact*)—that is to say, on the cartel organization. The fact of a joint action or an understanding when buying was also stressed by the English statutes in their terms *conspiracy* and *covenant*, and in the French *ordonnances*, which called them *conventicules*. Therefore Isay is not accurate when he says that “*from the wording of the German, French, and English legislation it follows that they were not primarily directed against cartels.*” The wording of these laws speaks precisely against Isay.

Isay is also mistaken when he claims that the interpretation of the jurists of the period supports his opinion.¹ On the contrary, as I have attempted to show before, the interpretations are really against it. In particular, MALYNES, and also DAM-HOUDERUS and PACIUS, to whom he refers, demonstrate that the laws were directed against cartels, not merely against isolated momentary speculative operations of merchants. This is further confirmed by the manifestations of public opinion at that time, especially in the well-known sermon preached by

¹ ISAY, *ut sup.*, p. 10: “Das ergeben die Erläuterungen der Zeit genössischen Schriftsteller, namentlich die Fälle, die sie als Vorstoss gegen Monopolverbote aufzählen.”

GEILER OF KAISERBERG, which Isay himself considers to be directed against cartels.¹

The exceptionally numerous anti-monopolistic laws, their interpretation, and the voices of public opinion in the sixteenth century prove that cartels were not a rarity, as Isay asserts, but, on the contrary, very common. It is only in that way that one can explain the strong reaction against cartels. The history of the cartel movement itself proves this; and I shall demonstrate in the next chapter that in the German States it developed more strongly than at any earlier time.

Finally, I may add that it can be inferred from the expositions of Isay on the origin of cartels that in formulating the laws against monopolies the legislators must have had cartels in mind. According to Isay, the first cartels came into being with the so-called *early capitalism* (*Frühkapitalismus*) about the close of the fifteenth and beginning of the sixteenth centuries. He represents it as a movement developed in the same atmosphere that drove Columbus and Vasco da Gama on their voyages of discovery and urged great merchants of the time eager for new gains to organize cartels in those regions of industry which were not controlled by guilds.² From this mode of representation it follows that cartels were not confined to certain sporadic cases, but, on the contrary, spread with an elemental force, embracing everything within their reach. This history confirms. But it was not the beginning of the cartel movement, as Isay asserts. Considering that the older cartels, like the modern ones, were always monopolistic organizations (which Isay, conformably to the current economic science, accepts without reservation), there is no doubt that as the anti-monopolistic laws of the period opposed monopolies *de facto*, they must also have been directed against the powerfully expanding cartels.

¹ ISAY, *ut sup.*, p. 10: "Verhältnismässig am deutlichsten wendet sich gegen Kartelle eine drastische Predigt des Geiler von Kaiserberg."

² ISAY, *ut sup.*, pp. 4 et seq.

CHAPTER VII

The development of the cartel movement in the German countries during the sixteenth century.—The approving attitude of the rulers.—The relation of the movement to the Mercantile System.—The firm of Fuggers as the pioneers of the cartel movement.—The copper cartel of 1515.—Instances of private cartels formed without the support of the kings.—Examples of individual monopolies.—The absolute preponderance of company monopolies (cartels).—The tin cartel of 1500.—The project of a tin cartel in 1518.—The project of the silver cartel of 1524.—The mining cartel of 1520 regulating the price of labour in the Saxon-Bohemian mining industry.—The tin cartel of 1520.—The cartel movement in other branches of the mining industry

IN spite of the increased action of legislation and the public opinion against monopolies, the movement of monopoly organizations in the sixteenth century did not slacken, but on the contrary steadily covered new fields of economic life; in the German countries especially it reached the zenith of its development. The sudden growth of commerce and industry, necessitating larger capital and consequently involving greater risk, carried the formation of a monopoly far beyond the financial resources of any single even richly endowed enterprise. Hence the establishment of so absolute a predominance of collective monopolies formed on the basis of agreements between several enterprises, sometimes even more than a dozen; that is to say, a preponderance of *cartels* over monopolies held by *individuals*.

The situation was also facilitated to a large extent by the economic policy of the European rulers of the time, who in search for new sources of income to finance their frequent military expeditions and to provide means for a sumptuous

mode of life¹ effectually fostered private monopolistic tendencies in commerce and industry, notwithstanding their anti-monopolistic laws and public opinion which was hostile to monopolies.

This became particularly noticeable in Germany during the sixteenth century. German kings and dukes, to whom the necessity, by the desire of replenishing their pecuniary resources, was of the first, if not of exclusive, importance, had always favoured the monopoly movement and supported it at every turn.² In particular the Emperors Maximilian I, Charles V, and Ferdinand I upheld such a policy.

The indirect support of the sovereigns continued to show itself, as formerly, by the leasing of numerous royal prerogatives to private entrepreneurs in return for large loans received in the form of enormous rents. Kings frequently organized monopolies, only to let them out in lease to the highest bidder. The monopolistic structure of these State enterprises assisted the lessees, who acted mostly under a cartel agreement, similar to the practice that prevailed for a long time in Italy, to mono-

¹ MARTIN, *La grande industrie en France sous le règne de Louis XV*, Paris, 1900, pp. 2 et seq., 30 sqq., and 228 sqq.; SOMBART, *Der moderne Kapitalismus*, München, 1928, 2nd ed., Vol. I, p. 369, and Vol. II, p. 924.

² JANSEN, *Jakob Fugger der Reiche, Studien und Quellen*, Leipzig, 1910, especially the excellent chapter, "Jakob Fugger und die hohe Politik," pp. 194-262; STRIEDER, *Studien . . .*, ut sup., pp. 78 et seq. On p. 78 he says: "Die Habsburger Karl V und Ferdinand I, wie die meisten damaligen Fürsten überhaupt, mussten die Anti-monopolbewegung, wie sich in der Literatur ihrer Zeit und auf den Reichs- und Landtagen ihrer Länder abspielte, mit recht gemischten Gefühlen betrachten. Ihrer Finanzpolitik war die Bewegung einesteils günstig. Das drohende Unheil, das in der Gestalt eines Reichskammergerichtsprozesses gleich einem Damoklesschwert über den Häuptern der damaligen deutschen haute finance hing, musste die reichen Kapitalisten den kaiserlich-königlichen Anleihewünschen gegenüber gefügig machen. Bei der obersten Reichsgewalt lag ja der einzige Schutz gegen die Eingriffe des Fiskals. Ferner bedeuteten auch die Schutzbriefe des Kaisers für die monopolistischen Kaufleute eine nicht geringe Einnahmequelle für die kaiserliche Kammerkasse."

polize the various markets. Further, these private monopolists were as *de jure* leaseholders of the State monopolies perfectly immune from all indictments for an illegal monopolization of the market.

Apart from this indirect furtherance of the cartel movement, there were frequent cases of active co-operation of kings and dukes in the formation of private cartels. Private entrepreneurs readily bore the high cost of this assistance, because in the ruler, as the sovereign power in the State, they could find an effective protection in case they should be called to account for the violation of anti-monopolistic legislation. The kings, indeed, often intervened with the authorities on behalf of those who were charged with the organizing of monopolies. In connection with this they frequently issued "*Safe-conducts*" (*Schutzbrieife, Majestätsbrieife*) which guaranteed the recipient exemption from impeachment and prosecution for the perpetration of the monopoly offence. The issue of those Safe-conducts became a new and by no means negligible source of royal revenue. For such a letter a fee varying between twenty and one hundred florins was charged. The house of Fuggers, for instance, obtained three such letters.¹ The exceedingly interesting policy of Charles V in favouring cartels will be considered later.²

The cartel movement, enjoying as it did the full support and co-operation of the kings, developed almost exclusively in the mining industry and its commerce, one of the most important German industries at that time. Numerous cartels in this sphere embraced, besides the whole of Germany, certain

¹ JANSEN, *ut sup.*, pp. 194 sqq. On p. 294 sqq. Professor Jansen gives a transcript of the two Safe-conducts granted to Jacob Fugger and the Company; the one of Madrid is dated March 18, 1525, the other, of Toledo, is dated September 26, 1525. STRIEDER, *ut sup.*, pp. 78 sqq. and 370-81. On pp. 371 et seq. he gives a copy of the Safe-conduct issued to the heirs of Jacob Fugger in Granada, bearing the date of October 19, 1526. Cf. also citation of Strieder on p. 230, in note 2.

² Cf. pp. 248 et seq., post.

neighbouring countries also, in particular Tyrol, Hungary, and part of Poland.¹ The German mining industry was then passing through a period of magnificent prosperity, which largely contributed to the growth and wealth of many towns and of the mercantile profession generally.² This clearly shows that cartels may appear in periods of economic depression as well as during a boom.

There is no doubt that the cartel movement, having for its object increase of the profits accruing from the enterprises brought under the cartel, contributed to a large extent to this exceptionally sudden development of the German mining industry, whereby it involuntarily realized the programme of the incipient *Mercantile System*. The Mercantilists, who intended to increase the industrial forces of the country by means of an economic system organized after a certain plan, found in the cartel movement a useful ally. Smith was right when he said that monopolies seemed "*to be the sole engine of the mercantile system.*"³ And in the German mining industry of the sixteenth century this opinion had been put to the test and proved to be correct.

But this was not so much a coincidence of ideas as, rather,

¹ JANSEN, *Jakob Fugger der Reiche*, ut sup., pp. 132 sqq. and 141; ZYCHE, "Zur neuesten Literatur über die wirtschafts- und Rechtsgeschichte des deutschen Bergbaues," in *Vierteljahrsschrift f. Sozial- u. Wirtschaftsgeschichte*, Vol. VI, 1908, p. 114; STRIEDER, *Studien . . .*, ut sup., pp. 3 sqq.; DAENEL, *Die Blütezeit der deutschen Hanse*, Berlin, 1906, Vol. I, pp. 61 sqq. and 89.

² STRIEDER, ut sup., p. 6: "Hunderte deutscher Städte und von deutschen Bergleuten gegründete oder emporgebrachte ausserdeutsche Städte *verdanken ihr Entstehen und ihr Wachstum unmittelbar dem Bergsegen*. Mittelbar aber nehmen alle deutschen Städte—die einen mehr, die anderen weniger—an der Ausbeute teil. *Was die deutschen Kaufleute des 15. und 16. Jahrhunderts im Bergbau und im Handel mit Bergwerksprodukten verdient haben, geht in die Millionen, ja man darf sagen in die Milliarden.*"

³ SMITH, *Wealth of Nations*, London, 1920, 2nd ed., Vol. II, p. 129: "*Monopoly . . . indeed seems to be the sole engine of the mercantile system.*"

a fortunate concurrence of effects. The Mercantile System aimed at raising the wealth of the nation and of the State as a whole, whereas cartels always sought to increase the possessions of their members, who represented only an insignificant part of the nation. Notwithstanding the fact that the cartel movement was undoubtedly in a great measure conducive to the development of many spheres of national economy in various countries, it was opposed, as before, in the period of the mercantile system also, both by legislation and by public opinion. For this reason I cannot agree with the view of ISAY that the cartel movement in that period owed the support of the rulers not to the fact that they wanted money but to the spirit of Mercantilism.¹ If this were the case, rulers would not be so isolated in their pro-cartel policy; and the cartel movement as a factor in the evolution of the Mercantile idea would have found recognition in public opinion and the legislature. Besides, this point is already sufficiently elucidated without reasonable doubt by the original investigations of historians, such as Professors JANSEN, EHRENBURG, and STRIEDER.² Their works demonstrate that the private capital requirements of the kings and dukes were the real motive for their support of the cartel movement. The same state of affairs already existed, and the economic policy of the Pope (the alum cartel) was not an exception.

It must, however, be borne in mind that just as the mining cartels in Italy, in particular the salt cartel of 1301, the alum cartel of 1470, the German mining cartels owed their origin in the first instance to the *private* initiative of important merchants and wealthy trading companies. Among others, the

¹ ISAY, *Entwicklung der Kartellgesetzgebungen*, ut sup., p. 12: "Indessen wäre es verfehlt, die Unterstützung des Monopolwesens durch die Fürsten lediglich auf deren Geldbedürfnisse zurückzuführen. Sie entsprach vielmehr dem Geist des Merkantilismus, wie er sich im Zeitalter des Frühkapitalismus auszubilden begann."

² JANSEN, *Jakob Fugger der Reiche*, ut sup.; EHRENBURG, *Zeitalter der Fugger*, ut sup.; STRIEDER, *Studien . . .*, ut sup.

famous company of the Fuggers, with its eminent representative JACOB FUGGER at its head, came into prominence. A series of cartels, starting with the copper cartel of 1498, was in the sixteenth century the work of the organizing spirit of the Fuggers.¹ In fact, there was scarcely a mining cartel at that time in Germany with which the Fuggers were not connected.

As capable organizers of a great number of trade monopolies the name of Fuggers was known not only in his own country but also abroad, e.g. in Spain² and Poland.³ With their name, to which I shall have to refer more than once, was connected one of the most active periods in the history of the cartel movement.

Thus the first more interesting cartel in the sixteenth century—the copper cartel of 1515—came into existence as a result of the initiative of the Fugger company. It was formed for the

¹ STRIEDER, *Die Inventur der Firma Fugger aus dem Jahr 1527*, Tübingen, 1905; JANSEN, *Die Anfänge der Fugger*, Leipzig, 1907; REICHARDT, *Jakob Fugger der Reiche aus Augsburg. Zugleich ein Beitrag zur Klärung und Förderung unseres Verbandwesens*, Berlin, 1926. Cf. also the works cited in preceding note.

² HÄBLER, *Die Geschichte der Fuggerschen Handlung in Spanien*, Weimar, 1897, deals with a number of trading monopolies, which the Fuggers, in conjunction with other important trading companies, leased from the kings of Spain.

³ JANSEN, *Jakob Fugger der Reiche*, ut sup., p. 141; PIEKOSINSKI, *Acta historica res gestas Poloniae illustrantia (1507-1795)*, Vol. VIII. *Leges, privilegia et statuta civitatis Cracoviensis*, Cracoviae, 1885, T. I, Vol. II, pp. 915 sqq. He cites the privilege of the Polish King Sigismund I, dated April 10, 1527, confirming the contract made by Fugger with the city of Cracow: "*Sigismundus I rex Poloniae, pactum a Fuggeris mercatoribus Augustanis cum proconsule consuli-busque Cracoviensibus de mercatura aeraria et plumbaria initum, ratum esse iubet.*"

Section 1 of the contract ran: "Inprimis exnunc et deinceps durante contractu ipsis Fuggeris et eorum successoribus liberum esse debet, cuprum suum ex regno Hungariae et plumbum ex hoc nostro Poloniae devehere, *quomodo et quocumque velint*, per aquam sive per terram, prout rebus et negotiis eorum expedit, sine aliquo civitatis Cracoviensis impedimento."

sale of Tyrolese and Hungarian copper¹ in combination with the Höchstätters of Augsburg, also renowned as founders of numerous monopolies.

The production of copper, growing more quickly than its requirements and consumption, caused a fall in the market price, which again brought about the formation of the copper cartel of 1498 and the conclusion of the cartel agreement in 1515. Here also, as in the former instance, the Emperor Maximilian I was, as lord of the mining royalties in Tyrol, directly interested in the maintenance of the existing market price of copper. As this could only be achieved by coming to terms with the competitive enterprises, he urged the formation of a cartel in 1515, as he had already done in 1498.

According to the cartel contract, which has been preserved, the high German (*Hochdeutschland*) and the Italian markets were reserved for the Tyrolese copper, and the Netherlands market was set aside for the Hungarian copper, exclusively exploited by the Fuggers. By way of exception the latter were allowed to smelt a portion of the Hungarian copper ore in their foundry at Hochkirch in Thuringia, and the copper produced there they could market locally. Another exception was made when they were allowed to buy a thousand hundredweights of copper and smelt it in their foundries in Jörigental, in Southern Germany.² The agreement stipulated for the Fugger company the right of passage of Hungarian copper through German territory, provided that not only pending the agreement, but also after its expiry, their copper while in transit would not be disposed of in German markets. Otherwise they ran the risk of seizure of the whole stock of copper and

¹ STRIEDER, *ut sup.*, pp. 501 et seq., gives a transcript of this cartel contract between Jacob Fugger and Ambro and John Höchstätters, November 19, 1515. The original is kept in the *Haus-, Hof- u. Staatsarchiv* in Vienna.

² JANSEN, *Jakob Fugger der Reiche*, *ut sup.*, pp. 115 sqq., explains that these 1,000 hundredweights had to cover the requirements of the Fugger Company.

other exemplary punishment by the Emperor.¹ His authority sanctioned and strengthened the penal provisions laid down in the private cartel agreement. This is an eloquent proof of the direct interest which the Emperor took in the formation and maintenance of this cartel. It was a typical *district* cartel, which though not fixing a uniform price removed competition by a strict apportionment of the selling areas. It was formed for a period of four years; its further fate, however, is unknown.

Along with cartels which came into being with the aid of rulers, such as the copper cartels of 1498 and 1515, there existed also cartels which owed their origin exclusively to private enterprise.

For instance, in the year 1523 the owners of the vitriol boiling plant at Goslar made an agreement with several Brunswick merchants to whom they undertook to supply, for three consecutive years, their whole production of vitriol at a certain price, and the annual supply was to amount to one hundred barrels at least.²

About the same time traders in Reichenhall salt formed a cartel at Wasserburg and Traunstein. The members were not allowed to order new supplies of salt until their respective quotas as detailed in the agreement were sold out.³ Thus the cartel maintained on the local market equilibrium between supply and demand.

¹ The Cartel Contract of November 19, 1515: "*So soll alsdann sein kays. mt. gut macht, fueg unnd recht haben, unns darumb wie sich geburt zu straffen unnd sonnderlich dieselben frembde kupfer, wa die betreten und gefunden wurden, als verfuert und verfallen gut, zu irer mt. hannden zu nemen unnd behalten.*" An exceptional manner of enforcing a private penalty for default, very rarely met with in the history of the cartel movement.

² NEUBURG, *Goslars Bergbau bis 1552. Ein Beitrag zur Wirtschaft- und Verfassungsgeschichte des Mittelalters*, Hannover, 1892, pp. 275 et seq.

³ EBERLE, *Die Organisation des Reichenhaller Salzwesens unter dem herzoglichen und kurfürstlichen Produktions- und Handelsmonopol*, München, 1910, pp. 72 et seq.

Simultaneously to the above there existed another cartel of salt merchants at Munich, who had their own guild.¹ Quite apart from any considerations of the varying needs of the Munich market, this guild cartel determined in its regulations the maximum salt quotas that their members could acquire.

At the same time there were not wanting private monopolies of single persons, which originated not in the agreement of several strong rivals in an endeavour to damp down competition and to gain control over the market, but in the formation of one strong undertaking aiming at *the same goal*.

A typical instance of this was the mercury monopoly which the Höchstätters formed at the beginning of the sixteenth century to control the world mercury market.² For some time the Höchstätters actually succeeded in gaining a monopolistic position; they had originally secured for themselves the entire mercury production, at that time concentrated in Idria and some other smaller sources. The unforeseen sudden discovery of new mercury mines in Spain and Hungary—to take them over was far beyond their financial power—brought about the bankruptcy of the monopoly, an event which for some time ruined the Höchstätters.

But even without the discovery of new mercury deposits, sooner or later a failure had to come. The huge stocks of mercury left after the dissolution of the monopoly were so much in excess of demand that they could not be disposed of. This was the inevitable result of the defective organization of the monopoly itself. Not having made any agreements with the producers for adjusting production to market capacity, the Höchstätters were unable to exercise any influence over this output which considerably exceeded actual needs. In order to create a demand they were taking the entire output of mercury, thus steadily

¹ EBERLE, *ut sup.*, p. 172. Eberle rightly remarks that this was undoubtedly a cartel, in spite of the guild organization of the salt merchants.

² EHRENBERG, *ut sup.*, Vol. I, p. 398.

locking up the capital of the company. This procedure was bound ultimately to lead to failure.

From 1488 onwards a number of similar single monopolies, designed as a rule for one year and renewed every year, was organized by the Fugger company in the copper and silver trade of the Tyrolese mines. Among these especially well known was the monopoly obtained through the purchases of the whole outputs of copper and silver in 1514. In the following year, Jacob Fugger repeated the same in conjunction with the house of Höchstätters.¹

Long before the Fuggers, in the year 1456, a similar monopoly existed in Tyrolese silver. The trading company of LUDWIG MEUTING secured a lease from Sigismund, Prince of Tyrol, who held the mine royalties.²

Another example of a single monopoly was the lease of the copper and silver mine at Neusohlen in Hungary, held by the Fuggers from 1525 till 1546, when Anthony Fugger gave notice of termination to King Ferdinand.³ This monopoly actually existed already, when in the nineties of the fifteenth century it was organized by the Fuggers in conjunction with the famous merchant of Cracow, JOHN THURZO. This company, though a branch of the Fuggers, possessed full autonomy and was administered as an independent enterprise. It was a so-called *Tochtergesellschaft* and had its own style, "*Der gemeine ungarische Handel*." In the year 1525 Thurzo retired from the company and the Fuggers remained the sole lessees of the monopoly.

But by far the greater number of cartels at that time came into being with the direct or indirect collaboration of the kings or dukes. This was quite natural, because such assistance not

¹ JANSEN, *Jakob Fugger der Reiche*, ut sup., pp. 30 et seq., 194 et seq., and 404 et seq.

² ZYCHA, *Zur neuesten Literatur über die Wirtschafts- und Rechtsgeschichte des deutschen Bergbaus*, ut sup., Vol. V, 1907, pp. 270 et seq.; STRIEDER, *Zur Genesis des modernen Kapitalismus*, Leipzig, 1904, pp. 102 sqq.

³ JANSEN, ut sup., p. 160.

only facilitated the initiative of private industrialists, merchants, and producers, but it also rendered them immune from prosecution by the State for violation of the laws. The first decades of the sixteenth century afford a long list of instances of such a co-operation leading to an expansion and establishment of the cartel movement.

In 1518 Elector Albrecht of Brandenburg gave in return for a loan of ten thousand marks, without interest, in one joint contract the exclusive sale of the amber production in his country to three trading companies, one in each of the sea-port towns, Königsberg, Danzig, and Lübeck, in their capacity as partners in the undertaking formed for this purpose.¹

In Saxony, as early as the closing years of the fifteenth century, with the help of Duke George of Saxony, a company trading in tin and styled "*Gesellschaft des Zinnkaufs*" was formed to increase the proceeds of the tin industry. It included the Saxon producers as well as those important merchants who had interests in the tin trade and who financed this company.² The Fuggers, too, participated in the company. In 1500, Duke George granted to this company, for a period of three years, the privilege of the monopoly of the tin trade.³ As a result of this charter, all producers of tin were obliged to supply the company with their whole output at a price fixed in advance; it was, therefore, a kind of *compulsory cartel*. According to an official announcement of Duke George, the Company was very prosperous and afforded a stimulus to the tin industry.⁴ Later, under

¹ STRIEDER, *Studien* . . ., ut sup., quotes on pp. 367 et seq., at full length, the original of the cartel contract of the Company, dated Königsberg, January 9, 1518.

² STRIEDER, ut sup., pp. 212 et seq.

³ The original of the document conferring the privilege of September 14, 1500, is quoted by Strieder, ut sup., on pp. 418 sqq.

⁴ "*Nachdem wir in vergangener zeit, gemeldtem unserm bergwerck zu gute ein gesellschaft bestalt und verordnet, dass alles zin bar ump berait geld bezahlt ist und auch die es bedorft zimblich und leidlich weise sein vorlegt worden, daraus dann gemeldtes unsers bergwergkes gedeihen scheinbarlich befunden.*" Hauptstaatsarchive, Dresden, Loc. 7414 (No. 2), Bl. 21. Cited by Strieder, ut sup., p. 226.

the pressure of an opposition on the part of tin producers, who preferred to have a free hand in the sale, the Duke was compelled, towards the close of the year 1504, to revoke the privilege.

In the following years a desire in favour of a restitution of the cartel monopolizing the tin trade was repeatedly voiced in economic and legal circles. A legal opinion of 1518 is noteworthy: in this, wherein an unknown author, most likely a lawyer, suggested a tin monopoly regulating not only dealings in tin but also its production. The author terms such a monopoly "*Zinnkauf*," thus giving an excellent illustration of the meaning of the *Kaufts* and *Ankaufts*, which expressions were very often employed both in legislation and practice as co-extensive with *monopoly* (cartel).¹ This goes to show that the old "*Kauf*" in the German monopoly law was not merely confined to *temporary purchases of goods for speculative purposes*, as is erroneously held by German writers in particular, who interpret the word *Kauf* too literally.

The author of this opinion strongly advocates the view that to improve the wholesale tin trade in Saxony its monopolization is necessary. He proposes the formation of a large trading company after the model of the old company of 1500, to which all mines would have to sell their outputs at a fixed price. In order to raise the low price of tin, production would have to be limited to the annual maximum of three thousand hundredweights.²

¹ The full text of this opinion is cited by STRIEDER, *Studien* . . . , ut sup., pp. 420 et seq., from the original kept in the State Archives at Dresden (H. St. A. Dresden, Loc. 7414. Den Zinnhandel betr. 1497-1544, Bl. 23 ff.). The pregnant title runs: "*Ein Bedencken wie ein zinnkauf auf dem Altenberg wiederum argerichtet werden könnte 1518.*"

Similar legal opinions regarding the old tin company (*Gesellschaft des Zinnhandels*) were published about 1500 by Dr. TILEMAN BRANDER (*De societate stanni*) and Dr. CHRISTOPHER KUPPENER. A verbatim citation of both is given by Strieder, ut sup., pp. 415 sqq. As they do not contribute anything new, I shall not review them.

² ". . . Und müsst das zinn allenthalben über 2-3,000 zentner das jar nicht gemacht, sollte es anderst bei disen schweren läufften und der grossen unwirde widerumb zu werden gebracht und mit nutz vortrieben werden." (From the legal opinion of 1518, cited in preceding note.)

The capital required for the formation and operation of the cartel company had to be subscribed by the Duke of Saxony and a number of other persons mentioned by name, including not only merchants and industrialists but also some other wealthy people. The author, who even laid down the number of shares to be taken by each partner, shows that he must have been well acquainted with the financial conditions of his country.

The management of the Company had to rest with two elected partners. By means of an adequate and subordinate administrative apparatus, with central offices established at Leipzig or in some other town, they were to regulate the whole tin trade and supervise the observance of the cartel contract.

In order to rid themselves of the competition of the Bohemian tin mines at Schlackenwald, which was endangering the price, the author suggested agreements with them, allotting markets and settling in exact figures the proportion of their production. Each of the two parties could mine up to 3,000 hundredweights per annum. The market of Nuremberg, annually absorbing 2,000 hundredweights, was to be left to the Bohemian mines, and the Dutch market of equal consumption was to be reserved for the Saxon tin. The remaining 1,000 hundredweights of their respective quotas they could sell in their own home markets. In order to win the support of the Bohemian mines for this scheme and induce them to abandon further competitive rivalry, the author reasoned that they would rather sell yearly 3,000 hundredweights of tin at a good profit than 6,000 hundredweights at a loss!¹

In order to pacify public opinion and convince it that the proposed monopoly was not, despite its *locking up of goods* (*Sperrung der Ware*, hence the later expression *ring* denoting cartels) and raising of the price, a usurious contract, and

¹ " . . . Und es were fürwar meines achtenns denen von Schlackenwalde nützer, 3,000 zentner mit zimlichen nutz zu vortreiben dan 6,000 zentner mit nachteil."

therefore did not contravene the monopoly prohibitions, either secular or ecclesiastic, the author reasoned that it was in the interest of the public welfare, and in particular of the poor, and that it gave no cause for qualms of conscience.¹ By "poor" he meant in the first place those workmen employed in the tin mines who, owing to the slump in this industry, were suffering want. Such a type of argument had but a formal significance. It was fitting and even desirable in face of public opinion to bring forward an explanation for the open advocacy of an institution which was condemned and legally prohibited. But neither its Christian and altruistic spirit nor the fact that it had in view the "common weal"—a phrase necessarily employed in the case of all monopolies supported by the rulers—could ensure actual and legal protection, which was, however, secured as usual through the fact that the Duke directly took part in its formation.

Owing to official condemnation of monopolies, the author was of course at pains never to use the expression *monopoly*. In the text as well as in the title he constantly speaks of the *purchase of tin (zinnkauf)*, and once he referred to it as *locking up of goods (Sperrung der Ware)*.² Consequently the legislator, aware of this practice, spoke also more often of *purchases and buying up of goods (Kauff, Ankauff)* than of *monopoly*.

The legal opinion represented above bears eloquent testimony that the organization of the wholesale trade and industry was well known in those days. It was clearly understood that the cartelization of a commodity could not be confined to commerce, but had to include simultaneously production. The value of international cartel agreements *in a form generally applied to-day* was also fully appreciated.

¹ " . . . Wan man von der rechtvorstendigen schon ein guten grundt hat, dass sollicher *einhandiger handel sambt sperrung und steigerung der war* umb des ennthalts der armen und anderer ursach willen one alle beschwerung der gewissen getrieben werden, dass man auch solliche erhalten möchte."

² STRIEDER, *Studien* . . ., ut sup., p. 230.

The opinion of 1518 was not an isolated case; we find other similar documents at that time. For instance, in 1525 the German merchant, CHRISTOPHER FÜRER, put forward a plan of a large cartel, including all German princes interested in the production of silver. Two courses for the pursuit of the policy of the cartel were open: one was directly to put up the price of silver, the other was to mint silver coins of a higher denomination, retaining the same old content of pure silver. This scheme received the approval of many princes. Nevertheless it was not realized, owing to the refusal of Duke George, who feared that a depreciation of money would be harmful to the country.¹

Another interesting example of a cartel indirectly influencing production is given by the international convention of 1520 between the owners of the mining undertakings in Saxony and Bohemia, that is to say the Saxon Dukes Frederick, John, and George, and two private firms, the Schlicks, who owned the mines situated in Joachimstal and the Pflugs, owners of those at Schlackenwald. It was designed to regulate the *supply and demand of labour* in the mining industries of both countries.²

The contracting parties bound themselves to observe the same uniform rate of payment to labourers in their plants.³ Mining in two shifts was not allowed, because work under such an arrangement was, in the opinion of the contractors, less

¹ PÜCKERT, *Das Münzwesen Sachsens*, 1518-1545, Leipzig, 1862, pp. 65 et seq., 73 et seq., and 100 et seq.

² The contract of this cartel is quoted by STRIEDER, *ut sup.*, pp. 427 et seq., from the original kept in the Main State Archives at Dresden (Kgl. Hauptstaatsarchiv zu Dresden, Loc. 4486. Bergwercks-Sachsen de ao. 1487-1599, Bl. 72-74).

³ “. . . Nemlich zum ersten, dass wir, obbemelten churfürsten und fürsten zu Sachsen, desgleichen die Slicken und Pfluegk auf unser allerseits bergwerckken vleissig achtung haben und *uns in keinen weg dahin bewegen und dringen lassen sollen, dass auf denselben der lohn erhöht, sonder auf allen bergwercken ein gleich lohn nach wert der z, so in eins yeden land genge ist, gegeben werden.*”

efficient and led to double pay, which was made daily per descent into mine.¹

At the same time, the cartel took precautions against any attempt on the part of its workmen to strike. Miners discharged for instigation to strike could not be employed by any works belonging to the cartel. Moreover, the parties to the contract undertook to prosecute and punish strikers endeavouring to go over in a body from one enterprise to another.² This cartel was renewed in 1540³ and continued for a number of years. It was a perfect counterpart on the one hand of the anti-lockout and anti-strike provisions of the constitution of the Emperor Zeno⁴ of more than a thousand years earlier, and on the other hand of the analogous conditions of the present day, another four hundred years later.

The demands mentioned above were successful in the creation of a tin monopoly, which was actually formed in 1520 on the strength of a privilege of the Saxon Duke George. A special trading company, headed by three important merchants of

¹ "Zum andern sal keinem hauer gestattet werden zwu schicht zu faren, dan nit wol moglich ist, wo einer zwu schicht faren und volkomen lohn darumb nehmen wil, dass er seiner arbeit umb seinen lohn genug thun moge."

² ". . . Zum funften, ob sich auf berurter bergwerck einem begeben dass sich etlich understunden bey gemeinen bergleuten unwillen, aufsteen und aufrur zu entporen und dieselben also mit ursach darinne vormerckt und auf solchem bergwerck abgelegt und vorweist wurden und sich auf die ander bergwerck begeben wolten, sollen sie auf der andern bergwerck keinen, wie ober gemelt, mit arbeit gefurdert werden."

" . . . Zum siebenden, ab sich nue daruber begeben, das, die knap-schafft und ander bergkarbeiter ein gemein aufsteen machen, auf welchem bergwerck einem das geschehe und sich also aus einem lande in das andere zu beschwerung der underthanen mit einem haufen niederlassen und legen wolten, dass alsdan wir obgedachten churfursten und fursten, desgleichen die Slicken und Pfluegk solchs nit gestatten, mit macht dawider trachten, die entwichene zu der gerechtigkeit halten und irs mutwillens strafen sollen."

³ Kgl. H. Staatsarchiv Dresden, Loc. 7215. Schlicksche Sachen . . . 1520-1540. Bl.68 ff. Cited by STRIEDER, ut sup., p. 44.

⁴ See p. 111 et seq.

Leipzig, one of whom was the firm of Welsers, reputed as organizers of many cartels, obtained for the period of three years a monopoly in the Saxon tin wholesale trade.¹

In his introduction to the conferment of the privilege the prince justifies the necessity of such a monopoly by the decline in the production and price of tin and a complete stagnation threatening this industry. There it is actually stated that the Duke, after profound and ripe consideration and a conference with the producers and merchants concerned, and in perfect agreement with them, came to the conclusion that the situation could be saved only by a monopolization of the tin trade. The common interest of the country depends, consequently, upon it.² This is one of the most characteristic documents revealing the undisguised co-operation of the supreme State authority with the private cartel movement, despite the anti-

¹ The original of this privilege, dated Dresden, December 20, 1520, is kept in the State Archives at Dresden (Loc. 9826, Altenberg . . . Mandat wegen des Zinn-Kauuffs 1520. Bl. 34 ff.). Its transcript is given by STRIEDER, *ut sup.*, pp. 424 et seq.

² "Wir Georg von gots gnaden hertzog zu Sachsen . . ., bekennen hiemit an diesem unserm offen brive, fur allen desselben ansichtigen und thun kundt: Nachdem und als sich *die bergkgebeude auf dem Altenberge* (the main tin mines in Saxony), *auch an etlichen andern orten in unsern landen und furstenthumben faste tief und schwehr machen und die zein etlich jaer in einen mergklichen abfal komen, dass auch diejhenigen, so di zein erbauet, schwerde halben der gebeude schwerlich dobei haben pleiben können und sich wol zu besorgen* (wo dem nit notturfthiglich vorgedacht) *dass die bergkwergk in einen schweren falh komen ader gantz mochten liegen pleiben und alsdan die leute sich an den ortern nicht mehr erhalten können und gemeinen unsern landen ein mergklicher schade und nachteil hiraus erwachsen wurde; solchs alles zuvorkommen und gemeinen unsern landen zu guthe, haben wir mit reifer, tiefer betrachtung mit denjhenigen, so auf dem Aldenberge, auch allen andern orten in unsen landen und furstenthumben zeinwergk bauen . . ., als vorkeufern an einem und etlichen kaufleuten als keufern am andern teile handlung furgewendt und einem rechten, redlichen uffrichtigen und bestendigen kauf und vortrag* (again a diplomatic evasion of the expression monopoly) *mit irer allerseits volwortte und vorwilligung drei jar langk zwuschen inen besprochen, aufgericht und beslossen, nachfolgender gestalt und meinung.*"

monopolistic laws and economic ethics of the period. The latter were becoming more and more divorced from reality.

The legal side of the organization of the new monopoly was not based on the above described opinion of 1518, but was rather a reiteration of the justification for the old monopoly company for the tin trade of the year 1500 ("*Gesellschaft des Zinnkaufs*"),¹ with which it had many points in common.

All tin producers within the Saxon Duchy were obliged to bring their whole output to the company. On delivery a fixed price was paid in cash. All masters of foundries and smelting plants made oath to the effect that they would not mix in their supplies inferior and better qualities. Producers trying to sell tin to someone else and not to the monopoly company forfeited the quantity in question, half of which fell to the Ducal treasury and half to the local Church. This was most distinctly a *compulsory cartel* with a compulsory membership of all producers in the country.

The duration of the cartel was designed for three years, the proviso being added that if either the company or the tin producers did not desire to renew the cartel contract, six months' notice before the expiry of the above period should be given.

At the same time the cartel made agreements with several tin mines outside the Duchy, such as those at Mückenberg and Graupen, which had trade connections with the Saxon tin market. In order not to lose entirely the Saxon market, these mines consented to sell the quantity destined for the Saxon market exclusively to the cartel at its fixed price. In fact they were forced to do so, as otherwise the ducal privilege provided for their exclusion. They retained of course their full freedom in other markets outside Saxony.

This cartel, with some alterations introduced in 1524, lasted until 1525, when the tin producers demanded a higher price for their tin and threatened to withdraw from the cartel. Upon the intervention of the Saxon Duke George in 1525, negotia-

¹ Cf. pp. 239 sqq., ante.

tions commenced between the members of the cartel, i.e. between the trading company and the tin producers; no information, however, is available as to the result.¹

Isay, in discussing the tin cartel of 1520, expresses the correct opinion that it was an instance of the *modern compulsory* cartel combining in one both of its modern forms, namely, a *contract dictated* to producers in the country together with an apparently voluntary contract of foreign producers interested in the Saxon market, who indirectly were compelled by the privilege of the Duke to join the cartel.² Isay is, however, mistaken when he says that this was *the first* instance in history of a compulsory cartelization. Without a prolonged search we find, in the same trade and country, that in 1500 the privilege of Duke George instituted an earlier compulsory cartel, the so-called "*Gesellschaft des Zinnkaufs*."³

As was the case in the tin industry, the cartel movement grew with the support of the rulers in the mercury industry and commerce of Idria,⁴ and also in other branches, especially in the mining industry.

¹ STRIEDER, *Studien* . . . , ut sup., p. 242.

² ISAY, *Entwicklung der Kartellgesetzgebungen* . . . , ut sup., p. 14: "Das erste Beispiel einer zwangsweisen Kartellierung, das mir bekannt geworden ist, enthält das oben zitierte Privileg Georgs von Sachsen für die Gesellschaft des Zinnkaufs vom 20. Dezember, 1520. Und zwar enthält diese Privileg interessanterweise bereits die *modernen Formen des Zwangskartells* einerseits das als 'diktierter Vertrag' ohne Zustimmung der Vertragsschliessenden vom Staat errichtete, andererseits das 'freiwillig,' jedoch unter staatlichem Drucke gegründete Zwangssyndikat."

³ Cf. pp. 239 et seq., ante.

⁴ HITZINGER, *Das Quecksilberbergwerk Idria*, Laibach, 1860; STRIEDER, *Studien* . . . , ut sup., pp. 292 et seq. and pp. 458 et seq., where a number of privileges and monopoly contracts (cartel contracts) of the mercury industry and commerce are quoted.

CHAPTER VIII

The pro-cartel policy of the Emperor Charles V.—First step in legislation in the direction of legalizing the cartel movement.—The Law of March 10, 1525, mitigating the severity of the provisions against monopolies.—The Mandate of Toledo of May 13, 1525, legalizing mining cartels.—The overthrow of the monopoly-favouring policy of Charles V by the Reichstag at Speier in 1526.—Reversion to the old system of "Safe Conducts" and personal intervention of the Emperor on behalf of the accused monopolists

THE economic policy of the Emperor Charles V, which was alluded to in the preceding chapter, requires closer consideration, not only because it illustrates the discord between the policy of kings on the one hand and legislation and public opinion on the other, casting a light on the motives underlying the royal policy, but, above all, because the politics of Charles V, in rendering lawful certain cartels, mark a new turn in the laws relating to the monopoly movement.

This policy was begun by an active co-operation at the formation of various private mining cartels. Whenever there was need for it, the Emperor protected monopolists by issuing "Safe Conducts" and by personal intervention with the authorities.

Particularly interesting is the intervention of Charles V in the case of Jacob Fugger and his associates charged with the commission of many monopoly offences. In a writ to the Procurator Fiscal of the Holy Roman Empire, dated September 15, 1523, Charles V demanded immediate cessation of legal proceedings which had been instituted against Jacob Fugger, Ambrose Höchstetter, Bartholomew Welser, and several other important merchants of Augsburg as well as their partners.¹

¹ STRIEDER, *ut sup.*, pp. 370 et seq., gives a transcript of this letter from the original text kept in the State Archives at Vienna (K. u. k.

The acting General Procurator Fiscal, whose name was Marth, was threatened that he would incur the grave displeasure of the Emperor if he did not at once stop the criminal prosecution and annul all decrees of the Court which might have been issued. The records of the case had to be delivered to the Imperial Chancery. To justify this command the Emperor put forward the excuse that although monopolies were forbidden in the country, in this particular case *there were weighty and well-founded reasons which would by no means permit the prosecution against these merchants.*

The Emperor also asked his brother, the Archduke Ferdinand, to command on his part the Procurator Fiscal immediately to stay proceedings and send the records of the case to the Imperial Chancery. He himself would look into the case, having regard to the existing legal order and the needs of the State. He would then notify the Tribunal of his decision as to whether the case should be taken up again.¹ It is clear Haus-, Hof- und Staatsarchiv in Wien. Reichsregistratur Karl V, 3 Bd., fol. 234).

"Wir Karl . . . empieten dem ersamen unserm, kaiserlichen procurator fiscalgeneral und des reichs lieben getreuen Gasparn Marth, lerer der rechten, unser gnad und alles gut. Ersamer gelehrter, lieber getreuer! Uns haben die ersamen unser und des reichs lieben getreuen *Jakob Fuckher* (i.e. Fugger) *unser rath*, *Andres Grander*, *Christoff Herwart*, *Ambrosins Hochstetter*, *Bartholomeus Welser* und *Andreas Rem* fur sich und irr mitverwannten clagweis furbracht, *wie du si, all irr mitverwanten und geselschafter vor unserm kaiserlichen regiment oder camerriechtern* und besitzern unsers camergerichts im hailigen reich mit unordentlicher ladung und verainter clag furgenommen habest, als ob er *Jacob Fuckher*, auch *Andreas Grander* mit irer beder mitverwanten und geselschaftern monopolien geubt und si, die andern all obgemelt, etlich unzimlich und in recht verspotten geding mit kaufen und verkaufen gebraucht haben solten. . . ."

"(2) . . . Und wiewol wir des Willens und endtlicher meinung sein dass im heiligen reich in zeit unser regierung *kein monopolien getrieben, auch alle verpottne unzimlich kauf und verkauf abgethan werden, so khunnen wir doch diser zeit aus etlichen trefflichen und wolgegrunten ursachen (uns dazu bewegend) kaimwegs zusehen noch gestatten, dass dermassen wider obgekauflut gehandelt und procediert solt werden.*"

¹ STRIEDER, ut sup., pp. 73 et seq.

that the announcement of the personal investigation of the Emperor was nothing else but a poor attempt to disguise the fact that such interference was irregular. He was impelled to this course by his financial dependence on the rich merchants of Southern Germany.¹ Despite the unusual civic courage of Procurator Marth, who at first tried to save the law and dared to resist the Imperial command, on receipt of a second letter from the Emperor of December 16, 1524, couched in stronger terms, he had to give way, and the whole case, as could be foreseen, came to nothing, and ended in the waste-paper basket of the Imperial Chancery. Charles V, having realism on his side, was strong enough to win.

In order to afford to the organizers of monopolies some protection at least against the direct interference of the Procurator Fiscal, who had proved to be unyielding in the prosecution of monopolies, Charles V availed himself of the power given to him by the Reichstag at Nuremberg, 1524,² and issued, on March 10, 1525, an act on monopolies and other prohibited operations in commerce,³ in which he also limited the former jurisdiction of the Procurator Fiscal. After that only the authority which was sovereign in the locality where the owner or manager of the enterprise in question was domiciled could indict for perpetration of the monopoly offence. If the competent authority neglected to proceed against an evident

¹ STRIEDER, *ut sup.*, p. 74; KÖNIG, *Peutingerstudien*, München, 1914, pp. 115 et seq.

² The *Reichstagsabschied* held at Nuremberg on April 18, 1524, authorized the Emperor Charles V to issue a law which had to suppress the defamed monopoly movement.

³ *Kaiserlicher maiestat ordnung, satzung und fursehung der kaufmanshendl halben zu abwendung der monopolien und anderer in rechten verpottner hantuerungen*—Madrid, 10 März, 1525.

KÖNIG quotes this law in full on pp. 169-174, and discusses it on pp. 116 et seq. He points out (p. 119) that the law was drafted by PEUTINGER, an eminent lawyer of Augsburg, enjoying the confidence and a legal adviser of important Augsburg merchants and the Emperor Charles V.

violation of the monopoly laws, or if it wilfully, without good reason, suspended proceedings already instituted, the Procurator Fiscal at first had to warn the said authority, and then, in case such reminder proved ineffectual, he could, after a lapse of one month, investigate the case without regard to the competent local instance.

The penalties also against monopolists were mitigated in this law. Formerly the monopolist forfeited his whole property; by the act of 1525 only that part of his property was confiscated by means of which he perpetrated the offence. In practice it amounted to the seizure of the stock of the monopolized goods. The seller of the monopolized articles was punished with the confiscation of the sale price he secured. The former penalties against those who *knowingly purchased monopoly goods*, because, it was argued, they aided the offenders, were repealed by this act. Otherwise the old classification of monopolies was retained; whether actually formed or merely attempted, they constituted a criminal offence, equivalent to forgery and fraud.

The law of March 10, 1525, openly favouring monopolies, had to face the general protest of society. It was said that the Emperor had misused the powers conferred on him by the Reichstag. The "*Reichsregiment*" did not, in fact, publish this act because the latter was considered a submission to the ambitions of powerful business interests; so that it is even disputed whether it ever formally came into force.¹

None the less, Charles V was not discouraged, and continued his policy of promoting the cartel movement. Two months later, on May 13, 1525, he issued in Toledo a new act in favour of cartels. This law, which is generally known as the "*Mandate of Toledo*,"² states that monopolistic cartel

¹ KÖNIG, *ut sup.*, p. 119.

² The original of the Mandate is kept in the State's Archives at Munich (k. allgem. Reichsarchiv. Reichskammergerichtsakten, Fasc. 201A). Strieder gives a complete transcript of it (*ut sup.*, pp. 375-381). Also JANSEN cites it in *Jakob Fugger der Reiche*, *ut sup.*, pp. 400

agreements in the mining industry and commerce do not fall under the heading of illegal monopolies and hence are exempt from punishment. This is the first time in the history of the monopoly legislation that *cartels*—the strongest and greatest in number, as were the mining cartels—*were regarded as lawful*, of course guilds excepted. Although very short lived, the Mandate of Toledo indicated that *the tide was on the turn towards an official recognition of private cartels*. And as such it is the most interesting document in the history of the old monopoly legislation. It was also the climax in the pro-cartel policy of Charles V.

Referring in the introduction to the general condemnation of every trade monopoly, which concentrated in one hand the whole stock or a considerable portion of a given commodity for a later sale at a higher price, as detrimental to the public welfare,¹ the Mandate of Charles V stated that it would be unjust to place in the same plane monopolistic organizations in the mining industry. This industry flourished in a much higher degree in the German countries than in any other Christian country. Hence its high stage of development must be maintained in the public interest, the more so, as it provided a livelihood to thousands of the German nation. A large trade in this branch of industrial activity increases the State revenue of the dukes and lords, at the same time augmenting the income of the German nation at large, and of the Holy Roman Empire. To achieve this end gold, silver, copper, mercury, and other metals must be sold at a good price, which must be uniform

et seq., from the copy of the Mandate which the Imperial Chancery made out for the *Fugger* Company. One more illustration of the real causes of the issue of this Mandate. Cf. also KÖNIG, ut sup., pp. 124 et seq.

¹ *Mandate of Toledo*: “. . . wie die furkeuf und monopolischen handel, die undter anderm wider gemeinen nutz dermassen beschehen sollen, dass die waaren all oder der merer thail oft in ein handt verkauft und darnach dester in hoherm, werdt oder gelt widerumb gegeben und verhandiert wurden. . . .” The invariably recurring and unaltered conception of monopolist organizations in their essence: concentration in one hand to enable dictation of higher prices.

and stable; and not at a price which is bad because it is low and variable. This could be secured only if the trade of these products was not dissipated among many, but concentrated in the hands of one or more.¹

Higher prices of those metals, especially copper and mercury, would not affect the German nation, since only a small portion was sold at home. By far the greater part was sold in foreign countries. Moreover, the Mandate continued, these products were not articles of first necessity which everybody needed.

In view of the above considerations and in order to intensify the productivity of the mining industry and protect it against decline or losses, the Mandate ordained that monopolistic agreements regulating the trade in mining products and concentrating it in the hands of one or more persons who sell these products at the highest price, as they might deem proper (*zum hochsten . . . nach irem gefallen verkauft und verhandtiert*), are lawful. Such operations are not "unseemly" (*unzimlich handlungen*), and must not be regarded as *monopolia*. No person may be called to account for having concluded such agreements; although they might seem to some people harmful, they are fruitful and commendable and further the general well-being.

In this fashion the principle of the medieval Christian economic ethics of "*the just price*" had been for the first time officially broken, and curiously enough the first step was taken by the leading monarch of the Christian world.

The Mandate ended with an appeal to all authorities, secular

¹ *Mandate of Toledo*: "... Und aber under allen fursehungen und mitlen, durch die die bergkwerck erbaut und statlich, fruchtbarlich, auch bleiblich underhalten, gehandthabt, gefurdert, auch gehayet mogen werden, kein dienstlichers und bestendigers erfunden werden mag, dan das gold, silber, kupfer, quecksilber und ander metal durch gut ordnungen vil ehe in einem guten und gultigen gleichen, auch bestendigen, dan einem schlechten, geringen, nidern und ungleichem werdt zu verkaufen und zu kaufen, auch darnach die widerumb derselben gestalt zu verkaufen und zu verhandtieren und also die nit in vil, sondern in ein oder wenig hendt zu verkaufen oder komen und verhandtieren zu lassen."

and ecclesiastical, asking them strictly to observe, under pain of grave displeasure, punishment and a fine of fifty gold marks, the provisions of the Mandate, and to abstain from any measure against those who formed lawful monopolies.

It might appear that, as the Mandate of Toledo legalized the cartel movement, which undoubtedly contributed largely to the development of the German mining industry and thus was realizing the programme of the mercantile system of the period, the future course of the monopoly legislation was determined once for all. Nevertheless, it happened otherwise. Like the law of March 10, 1525, the Mandate of Toledo, which sanctioned mining cartels, met with the decided opposition of the people. The general feeling was ventilated in the following year in the *Reichstag at Speier*, when sanction of all these laws was refused. All monopolies, without exception, as well as all trading companies which chiefly carried on a monopolistic policy, were again condemned by the Reichstag in strong terms in the interest of the same *common welfare* (*der gemeine Nutz*) which the Emperor used as the watchword of his pro-monopoly policy. The old penal sanctions of the Reichstag of Cologne, 1512, were resuscitated and the Procurator Fiscal was directly entrusted with the prosecution of all monopolies.¹

¹ *Reichstagsabschied of Speier*, 1526 (cf. note 1 on p. 179, ante): "... Nachdem die Monopolien und grosse Gesellschaften ein *eigen-nützige unleidliche Handlung*, die in *gemeinen kayserlichen Rechten bey hoher Pön und Straff verboten ist*, so soll der *kayserliche Fiscal gegen denselbigen*, wie sich im Rechten gebührt, *ernstlich procediren und handeln*, damit *dieselbige abgethan und der gemeine Nutz gefördert*

In a number of cases complaints against mining cartels were made by the *consumers*; in particular by smiths, who were the first to be affected by the raising of the copper and iron prices. Such a complaint is quoted on the ground of original documents by WOPFNER, *Quellen zur Vorgeschichte des Bauernkrieges: Beschwerde-artikel aus den Jahren 1519-1525*, *Acta Tirolensia III*, 1, Innsbruck, 1908, p. 120: "*Item die kupfersmid beswarn sich, dass die gesellschaften das eisen und kupfer verderbn, pitend solches abzustellen, auch daran und darob zu sein, dass uns Taufreer, kupfer von gewercken zu kaufen geben werde und nit von den gesellschaften.*"

At short intervals this prohibition was several times renewed by the resolutions of later Reichstags, in particular in the years 1529, 1530, and 1548; with these I have already dealt.¹

As on former occasions, the Emperor was this time also alone in his pro-cartel policy, although it agreed perfectly with the mercantile system. This fact is a further argument against all those who, like ISAY, look for the main source of the origin of the cartels of that period in the spirit of mercantilism: these cartels they identify with the genesis of the whole cartel movement, and leave out their strict and direct connection with the identical older cartels. If Isay, judging the text of the Mandate of Toledo merely at its face value, represents this movement as an outcome of a generally acknowledged economic necessity of the nation, he is at variance with the whole history of the Mandate, which proves something entirely opposite.² The Mandate of Toledo expressed the personal views only of the Emperor and of certain important merchants, especially the Fuggers, who organized cartels. These views were not shared by the nation and parliament, which would never admit that the cartel movement actually conduced to the development of the German mining industry.

To save the monopolists, who were repeatedly called to account in the criminal courts, the Emperor fell back upon the old practice of issuing "*Safe Conducts*" (*Schutzbriefe*). In this way only was he able to save the wealthy firm of Welsers, whom the Procurator Fiscal, known for the severity with which he proceeded against this class of offenders,³ brought to trial for the perpetration of a number of monopoly offences, in par-

¹ Cf. pp. 179 et seq., ante.

² ISAY, *Entwicklung . . .*, ut sup., pp. 4, 12 et seq. On p. 13: "Auf der anderen Seite aber werden die Monopolvereinbarungen überall da anerkannt, wo ihre volkswirtschaftliche Notwendigkeit klarliegt. In dieser Beziehung ist bereits das sogenannte *Toledaner Mandat Karls V* vom 13 Mai, 1525, und seine Begründung interessant."

³ Cf. p. 249, ante.

ticular the pepper monopoly which they formed in conjunction with the Portuguese King.¹ In the same year (1526) in which the Reichstag at Speier renewed in defiance of the Mandate of Toledo the severe prohibitions against all monopolies, the Emperor Charles V issued to the heirs of JACOB FUGGER a "Safe Conduct," protecting them from possible accusations by the Procurator Fiscal of monopoly offences.² By another writ of about the same time he shielded the mining trade of

¹ A transcript of the indictment of Bartholomew Welser and his associates is given by Strieder, *ut sup.*, pp. 381-383. The original is kept in the State's Archives at Munich (Reichskammergerichtsakten, Fasc. 201A). Cf. also KÖNIG, *ut sup.*, pp. 127 et seq.

² The original, dated Granada, October 19, 1526, is kept in the State's Archives at Vienna (Reichsregistratur Karl V, Bd. 5, fol. 285-288), and is quoted by Strieder, *ut sup.*, pp. 371-375. The letter clearly reflects the discord between the attitude of public opinion and the civic authorities on the one hand and the Emperor on the other, as to the value of monopolies. Here is its introduction:

"Wir Karl V . . . bekennen offentlich mit disem brief und thun kundt allmeniglich: Als verschinen iar der ersam, gelert, unser kaiserlicher camerprocurator-fiscal-general und des reichs lieber getreuer *Caspar Marth* vor unserm kaiserlichen stathalter und regiment im reich weilendt *Jacoben Fugger*, unsern rath, *sambt seinen mitverwandten und zugehörigen* neben und sambt etlichen andern citiert, furgenommen und beclagt hat, *als ob si etlich unzimblich geding, keuf und verkauf gethon, geubt und getriben hetten, dardurch unser und des reichs underthonen und gemainer nutz grösslich beschwerd beschedigt und verhindert und derhalben im rechten monopolia genent und verpotten sein sollten*, und wir aber den gedachten weilendt *Jacoben Fugger*, seine mitverwandten und zugehörigen eines erlichen dapfern wesens und gemuets alzeit erkennt und darzu *ir gewerb und hanterung mit allain aufrichtig und unverweisslich, sunder auch uns, dem reiche und gemeiner teutschen nation in vil weg frucht—und nutzbar befunden*, so haben wir bemelten unserm camerprocurator-fiscal vorlangst ernstlich geschriben und bevohlen, solcher seiner vermainte ansprach und clag gegen vorgedachten weilent *Jacoben Fugger* seine verwanten und zugehörigen, auch alle andern abzusteen und si derhalben unangelangt und unbekhumert zu lassen."

Concluding, the Emperor threatened that those who would not comply with these provisions exposed themselves to his grave odium, and became liable to punishment and a fine of 20 marks in gold.

the Fugger Company in Tyrol and Hungary.¹ All these writs he justified, like the Toledo Mandate, by considerations for the general prosperity of the German nation. This brings out in strong relief the strictly personal motives of the pro-cartel policy of the Emperor, a consequence of his financial dependence on the wealthy merchants of Germany, especially the Fuggers. And Strieder correctly observed that the need of capital by the Emperor was stronger than the law, and on this all attempts of public opinion and legislation to suppress the monopoly movement were wrecked.²

The unusual influence which the Fuggers exercised upon the Imperial Court and the high esteem which Jacob Fugger especially, a real Rockefeller in the cartel movement of the sixteenth century, enjoyed with the Emperor, is demonstrated by the following incident. On December 19, 1525, the Archduke Ferdinand, brother of Charles V, whom he later succeeded to the throne, went out to greet in Augsburg the Papal Cardinal, Matthew Lang, Archbishop of Salzburg, and passed through the streets of the town with a brilliant *cortège*. When the procession was approaching the house of the Fuggers, the Archduke, who had heard that Jacob Fugger was lying there dangerously ill, ordered all his trumpeters and kettle-drummers to cease playing and the whole procession went by in deep silence.³

¹ JANSEN, *Jakob Fugger der Reiche*, ut sup., pp. 404 et seq. He quotes this letter dated October 26, 1526.

² STRIEDER, *Studien* . . . , ut sup., pp. 87 et seq.

³ JANSEN, ut sup., p. 262: "Als der Erzherzog (*scil.* Ferdinand, the brother of the Emperor Charles V) am 19. December den Kardinal Matthäus Lang, Erzbischof von Salzburg, in feierlichen Zuge in die Stadt führte und sich dem Fuggerhaus näherte, da befahl er allen Trompetern und Paukenschlägern still zu schweigen; 'dann er hatte vernoman, dass jener tödlich kranck sei, und wollte ihm kaine beschweris verursachen, und er zog aufs stillste mit allem seinem volck vorbei' ('Chronik des Clemens Sender' in *Chroniken der deutschen Städte*, XXIII, 167).

So ehrte der Bruder des Kaisers, später selbst römischer König, den König unter den Kaufleuten."

CHAPTER IX

The further development of the cartel movement in German industry and commerce in the sixteenth and seventeenth centuries.—The project of Leipzig of 1527.—The compulsory tin cartel of Saxony in 1538.—The Thuringian copper cartel of 1534 and the history of its origin (the project of Fürer and the partial cartel of 1531).—The copper cartel of 1548.—The compulsory Bohemian tin cartel of 1549.—The unsuccessful attempt of the Emperor Maximilian II to form a Central European tin monopoly.—The Saxon cartels of 1562, 1564, and 1566.—The cartel movement in other spheres of the mining industry in the sixteenth century.—Cartels in the colonial grocery trade.—The pepper cartel-monopoly of Conrad Rott.—The Thuringian company for the trade in pepper.—The salt cartels of 1649 and 1659.—The cartel of 1668 in the wool industry.—The anti-monopolistic Edict of Frederick William, Elector of Brandenburg, 1653

IN the German mining industry of the sixteenth century monopolistic cartel organizations began steadily to describe wider circles. In 1527, among the important merchants in Leipzig there arose the project of a cartel to control the mining industry and commerce all over Central Europe. It is known in history as *the project of Leipzig*.¹ The author of it, whose identity has not been ascertained, thought that with the assistance of Duke George of Saxony the whole lead production in Goslar, the whole Bohemian and Saxon tin production, and the Bohemian copper and silver production could be amal-

¹ The original of the project, bearing the title *Vorsläge eines Leipziger Bürgers, wie den Leipziger Kaufleuten die Herrschaft über den mitteleuropäischen Metallhandel verschafft werden könne. Um Michaelis 1527*, is kept in the State's Archives at Dresden (Loc. 10, 532, *Leipziger Handel*, etc., 1525 bis 1551, Bl. 131 ff.). Strieder gives a transcript of it (ut sup., pp. 432 et seq.).

gamated and their trade concentrated in the hands of the merchants of Leipzig. The usual excuse for the formation of this monopoly was made, namely, by the "common welfare" of the citizens of the town,¹ and not without good reason, although the true motives of the formation of a cartel were of a strictly private nature.

Duke George received this project rather favourably; he not only promised his support but tried actively to persuade the various producers, especially the foreigners, to join the cartel. Unfortunately, an understanding could not be reached and the whole undertaking came to nothing.²

However, in the year 1538 a *compulsory cartel in the tin trade* was formed on the strength of a privilege of Duke George, dated May 26th and 27th of the same year.

MICHEL PUFFER,³ a merchant of Leipzig, was given, for the period of three years, the monopoly for the sale of the whole tin output of the mines at Altenberg, Lauenstien, and Bernstein.⁴ These mines were obliged to sell their whole production to Puffer at a price fixed in advance by the Duke in the charter. Puffer had further to finance the mining activities of the members of the cartel as needed.

Almost at the same time, through the agency of the Duke,

¹ *The Project of Leipzig*, ut sup.: ". . . Item die Stadt Leiptzig und alle ire inwoner mussten merklichen nachteil an irer narung erleiden, dieweil die Stadt und inwoner susst keine narung hat, dan von Merckten.

"Disem nach dem willen Gotes vorzukommen, ist vor gut und notturftig ansehen, dass vleis darauf zu legen sein solt, damit man den Bleikauf zu Goslar, die behemische kupfer und silber das Schlackenwaldische zinn und das zinn im fürstenthumb Sachsen alle in eine hant und an die inwoner zu Leiptzig bringen macht."

² STRIEDER, ut sup., pp. 247 et seq.

³ PUFFER, known already before in the tin trade as organizer of cartels.

⁴ STRIEDER, ut sup., pp. 435 et seq., gives a transcript from the originals of these documents, which are kept in the State Archives at Dresden (Hauptstaatsarchiv Dresden, Loc. 7414, den Zinnhandel betr. 1497-1544, Bl. 33, 35, 36 and 38).

the tin mines at Ehrenfriedersdorf, Thum, and Geyer consented to the cartel¹ on the same conditions for the same period of three years.

In the Ducal documents this cartel was always referred to as the *purchase of tin* (*Zinnkauf*). Although it had a *compulsory* character, the expression "monopoly" was never used, for fear that public opinion might be irritated. It was advisable to keep up the semblance of respect for their own anti-monopolistic legislation.

On the initiative of CHRISTOPHER FÜRER, who with the Puffers and Welsers belongs to the most prominent industrialist group of the sixteenth century, in 1534, after prolonged negotiations which lasted almost ten years, a cartel was formed in the new copper industry in Thuringia between the foundries which smelted the ores from the mines of Count Mansfeld.² It represents a *most up-to-date production cartel* and its history, therefore, deserves special attention.

The cause of its formation was the same as that which almost invariably underlies the origin of nearly all cartels, viz. *Rival competition*, diminishing the profits of the enterprises concerned. Arnstadt, the foundry of Fürer, the most important foundry in Thuringia in 1524, began to lose its hitherto uncontested position. Particularly threatening became the competition of the foundry belonging to the Leutenberg company. Outbidding one another in the purchase of crude ores each foundry endeavoured to secure the largest possible stock in order to increase their own production at the expense of its competitor. At the same time they were snatching away from one another customers by lowering the price of copper in markets and at fairs. Instead of the expected quick returns both sides were meeting with heavy losses. However, they

¹ STRIEDER, *ut sup.*, p. 438, quotes this document (Hauptstaatsarchiv Dresden, Kop. 103, Bl. 33, and also Loc. 7414, Bl. 37).

² MÖLLENBERG, *Die Eroberung des Weltmarkts durch dies mansfeldische Kupfer*, Gotha, 1911, pp. 55 et seq.

were still too strong for either of them to reckon upon a speedy victory. A sane instinct of self-preservation urged them to abandon the fight and enter on a path of mutual agreement. It was FÜRER who first understood this and gave in, suggesting a cartel agreement to Count Mansfeld, the founder and one of the owners of the Leutenberg foundry.

According to FÜRER's scheme, both foundries were to be equalized in size, equipment, and turnout. Though retaining separate managements, they were to act in perfect agreement. The totals of profits and losses of both foundries were to be added together every year and divided between them equally. The management of the new undertaking was to be undertaken by a Board of thirteen members, six from each side, and the thirteenth decisive vote was that of Count Mansfeld.

The Leutenberg people, however, objected to the size equalization as proposed by FÜRER. The toughest opponent was Jacob Welser, who argued that the foundry at Leutenberg had greater possibilities of development if not bound by a cartel. He was altogether against cartelization, as he thought that Thuringian copper would come off victorious in this struggle, because it excelled that of all other competitors in the European markets in quality, and the cartel would only hamper the possibility of extending sales. Nevertheless, negotiations were not broken off but continued for many long years, reminding one of similar cases to-day, when industrialists negotiate the formation of cartels.¹ And this was five hundred years ago! These conferences were greatly assisted by the general competition between all copper producers in Europe, then greatly increasing. Unco-ordinated production was more and more exceeding the requirements of the market, and consequently prices began to fall off. A crisis was engulfing all the foundries of Thuringia.

At this opportune moment FÜRER again put forward, in 1529,

¹ MÖLLENBERG, *ut sup.*, pp. 62 et seq., gives an interesting and exhaustive account of these negotiations.

a new project for a cartel which was to include not only his own foundries and those of the Leutenberg Company, but also all Thuringian foundries smelting ores from the mines of Count Mansfeld, then numbering seven. The cartel was to adjust the output of all undertakings to the demand, and set a uniform price for copper. This project combined the classical *production cartel with apportioned production and centralized sale* and the *price and conditions cartel*, and also to some extent the *district cartel*, no different in essentials from analogous modern *production cartels of the highest order*, which are erroneously stated to have been invented by our contemporaneous big industrial undertakings.

The modified project met with the opposition of Welser, who admitted that such a cartel would, owing to the elimination of competition, bring about a desirable rise in the price of copper, but considered it more important that the trade should be increased by extending sales. This he thought could not be attained if a cartel was formed. Only further powerful competition could bring back life into the trade. In Welser's opinion competition was not dangerous to strong industrial undertakings. It would ruin weaker competitors if they had to sell at still lower prices than those of the Mansfeld foundries, which had at their disposal copper of the best quality. Welser's unwillingness was in no small degree a result of the conviction that this foundry was in the meantime gaining an advantage over the foundry of Fürer.

Despite his strenuous efforts Fürer did not succeed in breaking the resistance of Welser, nor in winning him over to his plans. It required a strong depression in the copper market—which occurred later—and a further decline in the price owing to over-production, to shake the faith of the Mansfeld foundries in the truth of Welser's arguments, and helped Fürer in 1531 to bring for the time being four foundries under a cartel.¹ This cartel was based mainly on the project of Fürer. The foun-

¹ Arnstadt, Gräfenenthal, Steinech, and Schwarza.

dry of the Leutenberg Company, of which Welser was a partner, remained outside the cartel, and also two other foundries (at Eisfeld and Luderstradt) which were under the influence of the former; but even these showed a leaning towards a cartel. Welser, realizing that his policy was a failure, withdrew in 1534 from the Leutenberg Company, retiring from the copper industry altogether. Thus the last obstacle to the realization of Fürer's project had been removed, and in the same year (1534) the proposed cartel was formed, which included all the smelting works of the Mansfeld basin.¹

The organization of the cartel was not a complete realization of the project of Fürer, in that the sale was only partly centralized; on the other hand, the bond of the producers was closer than as proposed by Fürer.²

Production was apportioned. No member of the cartel could produce above the quantum allotted to him in the contract. Further, the quantity of copper which every member could bring into the market during a given period was strictly determined.

The sale had to take place in the markets of Nuremberg and Frankfort. The foundries sold in turn. A check on the sale was exercised, as in Fürer's original project, by the Public Weighmaster, whose duty it was to enter in his records minute notes of the contracting parties, the weight of copper sold, and the date of sale. The same particulars were also embodied in the vouchers that the public weighers issued at each transaction to the foundries so that they could verify their books, which all members of the cartel were obliged to keep. All sales were made through special agents appointed by the cartel at the common expense. This, however, is not to be confused with

¹ MÖLLENBERG, *ut sup.*, pp. 81 et seq.

² The cartel contract of 1534 has not been preserved, but the contract of December 15, 1536, which prolonged it, has been saved, and this is probably a true repetition of the former, as may be gathered from its content.

Cf. MÖLLENBERG, *ut sup.*, p. 82.

the permanent selling agency proposed by Fürer. These agents sold not on behalf of the cartel as such, but in the name of the various members of the cartel.

The sale was organized in a different way in the Fairs at Frankfort. Before each Fair a conference of all the members of the cartel was held to fix for every one of them the quantity of copper to be sent to the Fair. The sales at these Fairs had already been centralized and were effected through two merchants, nominated in each case by a meeting of the cartel members. These merchants formed a kind of temporary selling agency, which the members were obliged to inform of the quantity of copper they had for disposal at Frankfort.

This temporary selling agency had at the same time to fulfil another function. It was also an agency for joint purchase of raw materials for the use of the cartel members, viz. lead, which was used in the smelting of copper. Each member notified the agency for the mutual purchase, before the Fair, how much lead he would require, and the agency bought the required stock wholesale; this, of course, being cheaper and in turn lowering the cost of production of copper. In this respect the cartel went still farther than Fürer's project.

Every foundry was obliged to take care that the copper was of the best quality, and that it was not mixed with copper of foreign origin. The copper obtained bore the brand of the respective companies. In conformity with Fürer's project, the cartel also fixed the sale price, which all members had strictly to observe (*price-fixing cartel*).

Terms of payment were also uniformly regulated, and could in no circumstances exceed six months (*conditions cartel*). In case the debt could not be recovered within six months the loss was equally divided among all members of the cartel; it was a kind of partial *community of interests* (the German *Interessen-gemeinschaft*) through the common shouldering of common losses.

The Leutenberg Company, the strongest and most influential

member of the cartel, was given a privileged position, and the important market of Antwerp was reserved for it. Long before the formation of the cartel it had succeeded in winning this market for the Mansfeld copper, and was selling there upwards of two-thirds of its production. The cartel contract guaranteed fully the *status quo* in this market, giving the Company a free hand as to the quantity produced, the conditions of sale, and the price. Moreover, the cartel removed the possibility of the old competition on this market being waged by other members of the cartel. The latter were therefore not allowed to sell to those agents who would transport it to the Low Countries and compete there with the Leutenberg Company. Thus this was also to some extent a *district cartel*, which undoubtedly weakened its cohesion and influence in the market.

All disputes between the members arising out of the cartel agreement were submitted to special arbitration. The matter was tried before three judges; two arbitrators, having no interest in the affair, were appointed by the cartel, and they in turn chose an umpire.

The cartel of the Mansfeld Foundries did not disappoint those who placed their confidence in it. Figures which have been preserved in part show, for instance, that the dividend which in the Leutenberg Company amounted before the cartelization to 11 per cent. at most, rose in the second year (i.e. 1535) after the cartel was joined to 14 per cent., and in 1536 to 19 per cent.; and in the following year the shares of 100 florins yielded a profit of 22 florins 9 groschens! After less than three years the income of the Company, owing to the cartel organization, more than doubled itself.¹

In the middle of the sixteenth century the importance of the cartel declined, chiefly owing to the changes which in the meantime took place in the staff of the respective companies comprising the cartel. This reacted unfavourably on the

¹ MÖLLENBERG, *ut sup.*, pp. 82 et seq., collocates the preserved statistical data.

efficiency of the management. In particular the Leutenberg Company decayed, and lost, in the second half of the sixteenth century, the copper market at Antwerp, where before it had reigned supreme. These conditions facilitated the competition of rival undertakings, which then sprang up in great number, and speeded up the fall of the cartel.

With the assistance of the Emperor Ferdinand, an interesting cartel was formed in the beginning of the year 1548 between the FUGGER Company, which exploited the copper in Tyrol, and the Company of MATTHEW MAHNLICH, which exploited Hungarian copper.¹

After the Fuggers had given up the lease of the Hungarian copper mines, Ferdinand I let this monopoly to the Company of Mahnlich. There was reason to fear that the Hungarian copper, which together with that of Tyrol was formerly concentrated in the hands of the Fuggers, would become a dangerous rival of the latter.

The market of Europe was then overstocked and could not absorb the whole production which had exceeded the actual requirements. An attempt, therefore, on the part of the Hungarian copper to engage in a policy of competition would merely entail a decline in price. Not only would the Fuggers suffer losses, but the Emperor Ferdinand also, the lord of the mining royalties in Tyrol and Hungary, would be the loser.

Appealing to the last factor, Anthony Fugger induced the Emperor to insert into the *contract of sale* (*Kauf*, essentially an individual monopoly) of Hungarian copper the characteristic condition that the Mahnlich Company would keep to the copper prices then prevailing in Antwerp, the chief copper market of Europe, which were laid down by the Fuggers. It was definitely stated in the document that Mahnlich could lower the price only in case the Fuggers had already brought

¹ STRIEDER, *ut sup.*, pp. 493-5, quotes the transcription of the original contract of this cartel.

it down and then to the same level only.¹ The road to a cartel between these two companies could not have been better paved than by such a formulation of the contract of sale, and in the same year the cartel came into being.

To what extent Ferdinand acted in this case on the instigation of the powerful Fuggers and how much it concerned him that the price of copper should be maintained, may be seen from an extremely interesting letter which he wrote on January 21, 1548, to Anthony Fugger.² Under the protecting aegis of the Emperor and with his active support monopolistic combinations, though officially condemned and criminally prosecuted, were growing vigorously.

The copper cartel of 1548 was partly a *price-fixing* and partly a *district* cartel. The several markets were distributed between the Fuggers and Mahnlich. Only the Netherlands markets at Antwerp and Amsterdam were left open for shipments by both parties. But even there competition was limited, so far that both sides were bound by a common price below

¹ STRIEDER, *ut sup.*, quotes an extract from this contract on p. 493, in note 1. It reads: "Unnd damit der kauff unnd precio des kupfers, inmassen durch die Fuggerischen zu Anntorff (Antwerp) gepflegen würdet, in ainer gleichhait erhalten werde, so solle vilbemelter Mathes Mandlich und sein mitverwondten, wie er sich ze thuen bewilligt, erpoten und zugesagt hat, mit diesem erkhaufften kupher auch in kainen weg auf ain wenigens fallen, sonnder bey demselben vesst unnd stätt beleiben."

² STRIEDER, *ut sup.*, pp. 500 et seq., quotes a transcript of this letter which bears the date Augsburg, January 21, 1548. The Emperor informed Fugger that he had inserted the price clause in the contract with Mahnlich, and distinctly stated that in doing so he followed his advice ("*. . . mit deinem guettem wissen und sonderlich auf dein selbst ratlich guetbeduncken beschehen und erfolgt ist*"); and therefore he asked him also to keep to this price and not allow its decline: "*so gelanggt demnach unser genedigs beger an dich, du wellest also gleichermassen samt denjhenigen, so kupfer von dir erkauffen und annemen, in dem kauff nicht fallen oder abweichen, sunder die wirdigung und precium des kupfferkauffs hieuorgescriebner gestalt neben uns, fürnemblichen in bedacht, die weil solliches allen unsern Tirolischen, New-sollerischen und andern kupferperckwerchen zu wolfart, nutz und guettem geräichen mag, er halten helfen.*"

which they were not allowed to sell; they could only raise the price.¹

From correspondence which is extant between Anthony Fugger and Hans Dernschwam, his proxy in the negotiations for this cartel,² it is clear that Mahnlich urged the establishment of *joint selling agencies*, formed upon the model of 1498, at the chief copper markets, Antwerp and Amsterdam. Fugger, however, would not agree to this, as he feared that such a selling agency would have a greater tendency than the firms themselves to deal with bad payers. This, he thought, would not only make the firms run the risk of losses, but would also give rise to disputes between the members, as actually happened before in the case of the cartel of 1498, in which the Fugger Company occupied a dominating position. It was therefore decided that, except for the observance of the price, the members were to be given a free hand in the marketing of copper in the Netherlands. The further history of this cartel, which was formed for a period of three years, is unknown.

A merchant of Augsburg, called CONRAD MAYR, took the initiative in the formation of a *compulsory cartel of Bohemian tin*. It was based on a charter of the Emperor Ferdinand I of December 6, 1549, and was modelled after the similar Saxon tin cartel of 1538.³ All mines in Bohemia became its com-

¹ Section (b) of the Contract (cf. note 1, p. 268): "Im Niderlandt, als zu Annttorff und Ambsteramb, sollen bede tail frey sein und mügen verkauffen ires gefallens."

Section (f): "Es sollen auch pede tail im precio pleiben in allem verkauffen im Niderlandt, wie die Fugger bisher verkaufft haben, und darinn gar nit fallen, sy kondten es dann ainer höher verkauffen, das soll demselben zu guet komen."

² STRIEDER, ut sup., pp. 495 et seq., gives a summary of the letter which Anthony Fugger wrote to Dernschwam on February 7, 1548, at Schwarz; some parts are quoted verbatim.

³ K. u. k. gemeinsames Finanzarchiv in Wien. Gedenkbuch Böhmen, 1549-50, Nr. 305, fol. 112-115. A transcript of it is quoted by Strieder, ut sup., pp. 441 et seq. Also here the monopoly is called "*purchase of tin*" (*Zinnkauf*). Cf. pp. 239 et seq., ante, the Saxon tin cartel.

pulsory members and were obliged to sell their whole output to Mayr only, who had the monopoly of the sale of Bohemian tin for three years. In return for this, Mayr undertook to advance a loan of thirty thousand guilders to the Emperor. The latter also participated in the profit. These were the real causes that induced all rulers to support the cartel movement.

Particularly noteworthy is the passage in which the Emperor assured Mayr, in response to his request, that he would enter into negotiations with the Duke of Saxony with a view to persuading the latter to a cartel agreement.¹ This agreement between the Bohemian and Saxon tin producers was intended to remove competition which might easily frustrate the monopolistic policy of Mayr.

Two alternatives were laid down in the scheme: it was to be either a *price-fixing cartel*, binding the producers of Bohemia and Saxony to observe a common price, or a *district (Rayonskartell) cartel*, which would remove competition by distributing the markets between them.² In case exceptional difficulties should arise rendering the formation of the proposed cartel impossible, the Emperor undertook in the charter to ensure a monopoly for the Bohemian cartel by closing the frontiers of the Hapsburg countries to Saxon and other foreign tin.³

¹ The charter of Ferdinand, 1549 (as in preceding note): “. . . Wir sollen und wellen auch mit dem churfursten von Sachsen seiner, des churfursten zin halben die sach dahin handeln, damit er, churfurst dieselben zin, so in sein furtsentumben und landen gemacht werden, auch auf den wert und preis pringe und nit nachrer verkaufe oder den gwercken zu verkaufen gestatte, als wir unsere zin gegen ime Conraden Mair hinbracht und verkauft haben.”

² Ut sup., 1549: “So wir aber solches bei dem churfursten uber allen angewendten vleiss nicht erlangen oder dahin bringen mochten, so sollen und wellen wir alsdann bei ime, churfursten dahin handeln lassen, das dieselben zin an ende und ort verfuert und verschlissen werde, *alda si unsern behamischen zinen und ime, Conraden Mair daran im verschleiss und verkaufen nicht nachtaillich noch verhinderlich sein mugen.*”

³ Ut sup.: “Und wower uber urgewendten vleiss solchs bei gedachten churfursten auch nicht erlangt noch erhalten oder fueglich

Nevertheless, the unceasing efforts of the Emperor did not prove successful and a cartel was not formed. The Saxon producers were selling their tin in the Bohemian market cheaper than Mayr's cartel, and thus were threatening its existence. In order to save the Bohemian cartel the Emperor issued, in conformity with his promise of September 20, 1550, a mandate ordering that the frontiers of the Hapsburg countries should be closed for the import of foreign tin. Even the transit of foreign tin was forbidden under pain of severe punishment.¹

This mandate did not achieve the intended results. A considerable contraband traffic in Saxon tin continued to undermine the monopoly of Mayr. In March 1551 Ferdinand again ordered all custom officers to take special precautions to prevent smuggling.² But this, too, proved useless, and two later mandates of April and June of the same year were also of no avail.³ Competition from abroad became dangerous, foreign tin was sold about 35 per cent. cheaper than Bohemian, and Mayr, despite his repeated efforts, could not persuade the Bohemian producers to lower their extravagant prices.⁴ In consequence of this, and as tin was not an article in daily request, the demand shrank considerably.

The prospect was becoming more and more gloomy. To

weg darzu gefunden werden mochten, so sollen und wellen wir doch alsdann in allen unsern kunigreichen, furstentumben und landen mit ernst gebieten und verschaffen, auch darob halten lassen, das man berurte Sachsische noch andere frembde, gemachte noch ungemachte zin die obvermelten vier jar lang und *solang bis er Conrad Mair seine von uns erkaufte zin gar verkauft und vertriben haben wirdet*, in ermelte unsere kunigreich und lande nicht fueren, darinnen weder verkaufen, kaufen, verarbeiten noch durchfuren lassen sollen noch wellen, bei Verlust derselben auslendischen zinn."

¹ SCHMIDT, *Chronologisch-systematische Sammlung der Berggesetze der österreichischen Monarchie*, I. Abteilung, Wien, 1832-1834, Vol. II, pp. 339 et seq.

² SCHMIDT, ut sup., Vol. II, pp. 342 et seq.

³ STRIEDER, *Studien* . . . , ut sup., p. 277.

⁴ STERNBERG, *Umriss einer Geschichte der böhmischen Bergwerke*, Prag, 1836, Vol. I, p. 290.

save the situation the Emperor reduced his share in the profit by 2 florins per hundredweight and exempted the cartel from all rates due to the Treasury. Even that did not avail, and Mayr was compelled suddenly to lower the price from 14 florins per hundredweight to 12 florins, so as to get rid of the enormous stock that could not find buyers. He suffered thereby a loss of about one hundred thousand florins.¹ The sad presentiment of Mayr, that foreign competition would bring about his fall, proved to be only too true. Protective tariffs, despite the expectations placed in them, were unable to cope with competition. This cartel, though compulsory, was exploded by free competition, because it was not an outcome of the latter, but arose from the desire of the Emperor Ferdinand to strengthen his private financial position; Mayr also hoped to earn a substantial amount on this occasion. On the other hand, the producers themselves did not care much for the cartel, since its abnormally high price only made the sale of their tin more difficult. The cartel was of an extremely aggressive character, and was not satisfied with retaining the natural market price, but aimed at its artificial increase.

Towards the end of 1568 the plan of Ferdinand I and Mayr was resumed by the Emperor Maximilian II, who tried to organize with the merchants of Southern Germany another tin monopoly which would supply him with new capital.² For the monopoly they received, the merchants were to give the usual loan to the Emperor and a share in the profit, which was then fixed at a minimum of 1½ florins on every hundredweight. In the correspondence concerning this scheme

¹ *Denkschrift der kurfürstlichen Kammerräte vom 12. Oktober, 1569* (Hauptstaatsarchiv, Dresden, Loc. 36080, Nr. 664, Bl. 12A), quoted by Strieder, *ut sup.*, p. 278.

² SCHMIDT, *ut sup.*, Vol. III, Nr. 103, gives a transcript of the letter, dated December 13, 1568, from the Emperor Maximilian II to his private financial adviser George Ilsung. Maximilian asks whether there are any merchants in Nuremberg, Augsburg, or Ulm who would buy Bohemian tin (*Zinnkauf!* not a monopoly) at the price of 20 florins, or 19 florins, or even 18½ florins per hundredweight!

the Emperor said that he needed the money for the defence of the frontiers of the Empire against the Turks. Professor Strieder rightly remarks that this was obviously only a defence against public opinion which was hostile to monopolies.¹

As was the case at the formation of the compulsory cartel of Mayr in 1549, so in this instance the entirely personal motives shown in the direct interest of the Emperor in the cartel were manifest. It had nothing to do with the economic needs of the country and the "*spirit of the mercantile system*."²

The tin cartel devised in 1568 never came into existence. In order to gain control over the tin market of Central Europe, on which the success of the monopoly depended, the serious competitors of Saxony had to be brought under the cartel. In this case also the Emperor was unsuccessful, and neither the opposition of the Saxon tin producers nor that of the Duke August, who most definitely rejected the project, could be overcome.³

At that time many voluntary cartels existed in the tin trade of Saxony. In 1562 such a cartel was formed by GEORGE HUTTHERR and five other wholesale tin merchants with the tin mines at Altenberg.⁴ It was supported by the Duke of Saxony. This was a price-fixing cartel which also indirectly influenced

¹ STRIEDER, ut sup., p. 280: ". . . Sehr charakteristisch betonte der Kaiser in verschiedenen Schriftstücken zu dieser Angelegenheit, er benötige das Geld, um die Grenzen gegen den Erbfeind der Christenheit, die Türken, zu schützen! Das war offenbar als Rückendeckung gegen wirtschaftsethische Vorwürfe gedacht."

A passage from the letter of Maximilian II to his financial adviser Islung which refers to this matter is characteristic: ". . . Und ehe man ein solche angefangene stattliche handlung, deren wir jährlich umb was ansehnliches geniessen möchten" (F. A. Wien. Böhmen, M. u. B. 1540-69, No. 16406, and ibid., M. u. B. 1570-90, No. 16407, cited by Strieder, ut sup., p. 280).

² Cf. pp. 232 et seq., ante.

³ STRIEDER, ut sup., pp. 282 et seq.

⁴ The contract of May 6, 1562, in Hauptstaatsarchiv, Dresden, Loc. 36080, Nr. 666, Bl. 75 et seq. Quoted by Strieder, ut sup., pp. 446 et seq.

the quantity of production, for the cartel contract fixed not only the price, but also the quotas of tin which the merchants, members of the cartel, had to buy within two years (the period for which the cartel was formed) at a certain price from the producers, it being stipulated at the same time that these merchants were the sole buyers of tin. Hence it was not in the interest of the producers to turn out more than this fixed quantity, because they could not dispose of the tin so long as the cartel contract lasted. In the same country two similar cartels were formed in the years 1564 and 1566. All three are described in the extant contracts as for the "*purchase of tin*" (*Zinnkauf*), a term always employed by all old monopolistic organizations.¹

An identical cartel movement which monopolized the various home and international markets was at the same time going on in other branches of the mining industry, particularly in the mercury trade, where the name of the Fuggers was linked with almost every cartel.² These cartels, however, make no new contributions to the historical evolution of cartel forms, and I therefore refrain from a more detailed description of them.

In the course of the sixteenth and seventeenth centuries fierce competition in the salt industry of Bavaria and Tyrol often led to cartel agreements of the enterprises concerned.³ Among the more interesting of these is the cartel which the Bavarian and Tyrolese salt mines concluded in 1649. It distributed the markets and fixed a common price for salt below which the parties were not allowed to sell. Conditions of sale to wholesalers and particularly the mode and time of payment were unified. The wholesaler who did not discharge his obli-

¹ Hauptstaatsarchiv, Dresden, Loc. 36080, Nr. 666, Bl. 86 et seq., and Bl. 89 et seq. Strieder, ut sup., pp. 451 et seq., gives transcripts of both documents.

² STRIEDER, ut sup., pp. 458 et seq., and 513 et seq., transcribes several extant documents referring to these cartels. The cartel movement in this sphere of industry was even earlier fully developed.

³ EBERLE, ut sup., pp. 72 et seq. and 111 et seq.

gations towards a member of the cartel could not get supplies from other members. Further, the parties undertook to keep one another well informed of competition in their markets, especially of the movements of sea salt from Burgundy, Lorraine, and France. In order that the observance of the cartel contract could be mutually checked, both parties were allowed to appoint their controllers.¹

This was a typical *district, price- and conditions-fixing* cartel, not differing from analogous modern cartels. The contract was first made for three years only, but was then several times renewed. In the year 1677, with a view to making the cartel more coherent, a new provision was added to the cartel regulations: each party had to notify the other of all wholesale contracts for the sale of salt.²

Owing to its striking resemblance to present conditions, the progress and final result of the competition between the Bavarian-Tyrolese cartel and the similar cartel of the salt from the Burgundian mines is especially interesting. The latter intended to extend its sales abroad at the expense of the former, and began, in the middle of the seventeenth century, to sell salt abroad without profit at actual cost of production. The Bavarian-Tyrolese cartel replied by lowering their former, uniform price still further.³ When after a struggle which lasted several years it was evident that neither of the parties would succeed in expanding its sale at the expense of the other and

¹ The original of this contract, dated Rosenheim, August 5, 1649, is kept in the Münchener Allgemeines Reichsarchiv (Tirol, fürstl. Grafschaft. 19, fasc., Bl. 7 ff.). Strieder copied it out, *ut sup.*, pp. 406 et seq.

² The original of the supplementary cartel contract, dated Kufstein, September 20, 1677, is kept in the Münchener Allgemeines Reichsarchiv (Loc. Tirol, fürstl. Grafschaft. 19, fasc., Bl. 99 ff). Its more interesting passages are quoted by Strieder, *ut sup.*, pp. 196 et seq.

³ EBERLE, *ut sup.*, pp. 111 et seq. The supplement of the Bavarian-Tyrolese cartel contract, about the lowering of the price of salt in foreign markets, dated Kufstein, October 5, 1651, is quoted by Strieder, *ut sup.*, pp. 410 et seq.

that a lowering of the price would mean only a further loss for both of them, in 1659 the private lessees of the Burgundian mines took the initiative and a cartel was formed.¹

This was again quite a modern *international* cartel, a form that has been known and applied long since, especially in the salt industry and commerce, e.g. the international salt cartel of the year 1301 between the kings of Naples and France.² As with the Bavarian-Tyrolese cartel of 1649 it removed mutual competition, partly by a territorial division of the markets, and partly by fixing a uniform minimum price, unconditionally binding upon the parties in common markets. The terms of sale to wholesalers, the mode of payment, the number of instalments, and the dates when they had to be paid off, were also regulated on a standard basis. The granting of rebates or prolongation of the time for payment were strictly forbidden. Thus it was a *conditions* cartel.³

This cartel was several times renewed and lasted for many years. Its existence and maintenance was officially defended by

¹ The original of the contract, dated November 3, 1659, is kept in the Münchener Allgemeines Reichsarchiv (Loc. Tirol, fürstl. Grafschaft, 19, fasc., Bl. 67). Strieder quotes it on pp. 411 et seq. This contract was drawn up in six originals: three in German and three in French. A French text is kept in the Münchener Allgemeines Reichsarchiv (Loc. Tirol, fürstl. Grafschaft, 19 fasc., Bl. 1 ff.).

² Cf. pp. 133 et seq.

³ The contract of 1659: "Ferners und zum dritten ist verglichen dass die Burgundischen Fermiers (the name of the lessees of the Burgundian salt mines) von iren Contrahenten vigore diser Verstandnus allain das baare Gelt und khain andere Werth oder Zallungsmittel, wie das Nahmen haben mag, für das Salz annehmen und ihnen die 1. Zallungsfrist: nemlich den 4. Tail der völligen Khaufsumma gleich bei Beschluss des machenden Contracts erlegen lassen, die übrige 3 Fristen aber in negst nacheinander darauf volgender 3 Jahrs-Quartale yedemahl einen Teil zu empfangen haben. Auch baide chur- und erzfürstliche Häuser wie nit weniger die Fermiers denen Saltzhandlsleuthen bei Machung der Conträct einichen Fortheil, essey mit Eingab, Lengerung der Porg oder wie es sich in ander Weeg directe vel indirecte begeben mag, mit ervolgen oder zu guetem khomen lassen sollen."

the necessity of augmenting the returns of the Fiscus to cover the cost of a possible war with the "enemies" of Christianity. The Dukes in question (the owners of the cartelized mines) felt that this task was incumbent upon them.¹ In this way the kings and dukes veiled their pro-cartel policies, which were systematically pursued in defiance of their own legislation.

Cartels were also resorted to in the colonial grocery trade of the sixteenth and the seventeenth centuries. The trade in pepper from India, which was a privilege of the Portuguese kings, was one of the chief objects of many cartels.² The Portuguese kings as a rule sold the whole annual consignment of pepper to wealthy trading companies for the most part of Southern Germany, which thereby acquired a monopoly in the pepper trade. The contract of sale generally purported to be valid for several years; in some cases it was renewed every year. Usually several trading companies took part in it, as one alone was not able to lay out the large sum of money required for a single pepper consignment. To cover this price and make a profit in addition, pepper had to be sold at a price that was uniform, sufficiently high, mutually fixed, and strictly observed.

¹ In the renewal of the contract of 1686 (the original is kept in the Münchener Allgemeines Reichsarchiv, Loc. Tirol, 19. fasc., Bl. 147, and Strieder quotes some parts of it, pp. 199 et seq.) we read: ". . . Das Absechen haubtsächlich dahin gerichtet ist, dass *baide hegste Heuser einander . . . die Handt pietten und beiderseits Camergeföll helfen vermehren und verbessern.*"

". . . Ohne disem so gewaltigen Widerstandt diser 2 Potentaten das ganze Hail des auserwöhlten Volckhs Christi hegstens periclitijert hete. Welche Gefahren verrer abzuwenden es annoch unbeschreiblichen costen erfordert wirdet. Solchen grossen Costen aber beide Hofcamer billichist aus eben jenigen Mitteln suechen müssen, die ihnen von dem Allmechtigen und der Natur vor andern Landschaften vermuetlich zu dem Ende seint aus getlicher Vorsichtigkeit zuegeaignet worden, *damit sye hieraus den nervum belli gerendi pro ecclesia Christi erziehen und bestreiten khönnen.*"

² EHRENBERG, ut sup., Vol. I, p. 399; HÄBLER, "Konrad Rott und die Thüringische Gesellschaft," in *Neues Archiv für die sächsische Geschichte*, 1895, pp. 177 et seq.

Without a cartel agreement between those who acquired the monopoly this would be impracticable.

We find an interesting instance of such a monopoly in the cartel which in the seventies of the sixteenth century was formed by the Augsburgian merchant CONRAD ROTT, who used the pepper cartel of BARTHOLOMEW WELSER of the beginning of the sixteenth century as his model.¹ The fact that Welser had to run the gauntlet of public opinion, and that this cartel ultimately led to his being charged with the *perpetration of many monopolies*,² did not deter Rott. By virtue of a contract of sale made with the Portuguese King, Rott purchased the monopoly of the European pepper trade for a number of years. In order to be able to pay the enormous purchase price³ he formed a special trading company with a number of important firms of Portugal and Italy. The price was divided into thirty shares: of these twelve and a half were taken by Rott, ten by the Portuguese firms, and seven and a half by the Italians. Mutual competition was avoided by distribution of the several markets: Germany, the Netherlands, Poland, and the eastern countries were assigned to Rott; Portugal, Spain, France, and England were given to the Portuguese firms; and Italy to the Italian merchants. A heavy penalty was laid down in advance for intrusion upon the markets of the others, 10 ducats on each hundredweight of pepper sold outside the assigned territory being payable to the side which had been wronged. This enterprising merchant made also in his own name a special agreement with the Saxon Elector; this cartel has been called "*Thuringian Company for the trade in pepper*" (*Thüringische Pfeffergesellschaft*). It had to concentrate in the market of Leipzig the wholesale trade in pepper of Germany, the Nether-

¹ HÄBLER, *ut sup.*, pp. 185 et seq.

² Cf. p. 249, ante.

³ I.e. 34 ducats per hundredweight; and in the first year he was obliged to buy 12,000 hundredweights, and later 20,000 hundredweights yearly. Further, Rott undertook to make a loan to the King. The loan was granted on very low interest and amounted to several thousand ducats, repayable in kind (pepper) during the last year of the contract.

lands, Poland, and the eastern countries of Europe (the district of Rott's cartel), as well as to secure the credit which Rott needed to finance his trade.¹

In 1668, as a result of long preparations, a cartel was formed between the trading companies at Pforzheim and Calw dyeing certain textile fabrics (*Zeugindustrie*); it regulated in the common markets the price and terms of sale of specified articles. Although the original project of this cartel was worked out as early as 1620, it was not carried into effect until then.²

The Edict of the Elector of Brandenburg, Frederick William, 1653, shows that the cartel spirit was at that time, as before, spreading also over other spheres of industry, also in handicraft and commerce. *Inter alia* agreements of hop users are referred to in the Edict; under the sanction of fines fixed beforehand they agreed to buy hops at a certain uniform price.³ This is a typical *purchase cartel* (*Einkaufskartell*), a form known even earlier.⁴ The Edict vindicating freedom of trade (*Freiheit der*

¹ TROELTSCH, *Die Calwer Zeughandelskompagnie und ihre Arbeiter*, Jena, 1897, pp. 30 and 96.

² STRIEDER, *ut sup.*, p. 201, quotes the following passage from the Edict of the Elector Frederick William, of July 26, 1653: "*Demnach wir auch berichtet worden, dass die Hopfen-Führer sich untereinander wie hoch sie den Hopfen einkaufen wollen, verbinden, und wer dawider handelt unter sich strafen: So wollen wir solch schädliche Monopolia nicht dulden, sondern durch öffentliche Edicta verbiethen, auch dem Magistrat jedes Orths anbefehlen, hierunter mit Fleiss zu inquirieren und die Delinquenten gebürlich darüber strafen.*"

"... *An denen Monopoliis und dass etzliche Handelsleute und Handwerker wegen des Korn-, Viehs-, und Woll-Kauf, etc., zu Schaden ihres Nechsten unziemliche Verknüpfungen machen, tragen wir keinen Gefallen, es soll auch solches hiemit verbothen sein.*"

³ Cf. quotation in previous note.

⁴ The researches of historians are rendered especially difficult by the fact that numerous trading companies and merchants who took part in the formation of monopolies as a rule destroyed all documents as soon as the cartel contract expired for fear of the impending danger of criminal prosecution. History, therefore, cannot derive much from the archives of merchants. Cf. EHRENBURG, *Zeitalter der Fugger*, *ut sup.*, Vol. I, p. 396; JANSEN, *Jakob Fugger der Reiche*, *ut sup.*, p. 52; STRIEDER, *ut sup.*, p. 162. Cf. also note 1, p. 160.

Commerciens) ordained that all such monopoly agreements should be prosecuted and punished.

I have endeavoured to compile details of all German cartels of the sixteenth and seventeenth centuries that deserve notice, so far as they have been discovered, and to survey one of the most interesting periods—especially the former century—in the history of the cartel movement in Germany which in the literature of the subject, even in that of its own country, has often been misjudged.

CHAPTER X

Monopoly organizations in France in the sixteenth and seventeenth centuries: in the corn and victual trades, in the timber trade, and in the coal-mining industry.—Contemporaneous cartels of merchants and producers in the Netherlands.—The monopoly movement in England in the sixteenth and seventeenth centuries.—The crime of conspiracy.—The monopoly-favouring policy of Queen Elizabeth and her successors.—The Merchant Adventurers' Company.—Mining monopolies.—The coal cartel at Newcastle-upon-Tyne.—The Act of 1664 regulating coal prices.—Comparative study of the conditions in England and Germany.—The thesis of Professor Levy.—Sombart's Theory

IN France in the sixteenth and seventeenth centuries the monopolist agreements most frequent were those of corn and other victual merchants. The anti-monopolist enactments of the French legislation dealt primarily with these. It is obvious from the declaration of King Louis XIV in 1699, regulating the corn trade, that the monopoly companies of corn merchants were not confined to the *local* markets in the French towns.¹

¹ DE LA MARE, *ut sup.*, pp. 707 et seq., *Déclaration* dy Roy of August 31, 1699, Art. VIII: "Faisons defenses à tous Marchands de grains, de faire ny contracter aucunes societe avec d'autres Marchands de grains, soit des mêmes Villes et lieux de nostre Royaume, à peine de confiscation des grains appartenans ausdits Marchands associez dont un tiers sera délivré au denonciateur, de deux mille livres d'amende, et d'estre déclarer incapables de faire à l'avenir le trafic de marchandises de grains."

Also the three following articles (9-11) of this decree were directed against monopoly companies of corn merchants. Article 10 further prohibited the buying up of corn when still on the field. According to Article 5, the decree was applicable to anyone, not corn merchants only.

De la Mare explains on p. 708 that this declaration was in practice also applied to millers and bakers who were monopolizing the flour

As far back as the beginning of the seventeenth century we find traces of a developed cartel movement in the French timber trade. In order to attain higher prices of timber and to be able to dictate their own terms to merchants-middlemen,¹ timber traders of *Laigle* and *Compiègne* formed, in 1606, a price-fixing cartel. Simultaneously a *cartel for joint sale* was formed between the more important timber merchants in Paris; as a result of it the price of wood suddenly rose. Those who were affected by this rise applied for assistance to the municipal authorities, who decreed the dissolution of this cartel, forbidding merchants to "*cabal for the sale of wood.*"²

In the mining industry we have a *quota cartel*, formed in 1647 by the lessees of the coal-mine in the *Alais* basin. The regulations of this cartel determined strictly the output of each member.³

Towards the close of the seventeenth century (in 1698) an attempt was made to form an association of butchers in the town of *Argenson*. A permanent board (*bureau perpetuel, sorte d'agence centrale de la corporation*) had to see to it that the quantity of meat in the market was reduced in order that better prices could be secured. This resembles the meat trusts in America to-day.⁴

or bakery goods trade respectively. This was confirmed with regard to bakers by a later additional declaration of Louis XIV of September 1, 1699.

¹ CHASTIN, *Les trusts et les syndicats de producteurs*, Paris, 1909, p. 12.

² CHASTIN, ut sup., p. 12: "Paris nous l'avons dit, recevait surtout des bois flottés. *Les principaux marchands du port s'associèrent pour la vente en commun de ces bois.* La voie qui coûtait quatre livres deux sous six deniers monta à cent dix sous et plus. Les particuliers grevés par cette hausse anormale réclamèrent au Bureau de la ville, qui *condamna l'association à se dissoudre et défendit aux marchands de 'caballer pour la vente des bois'* (Registres du Bureau de la Ville, 14 mai, 1608, CCCXVIII)." *Die Entwicklung der deutschen und ausländischen Kartellgesetzgebungen*, Berlin, 1930, p. 7), and, appealing to

³ CHASTIN, ut sup., p. 13.

⁴ ISAY quotes this fact (*Die Entwicklung der deutschen und ausländischen Kartellgesetzgebungen*, Berlin, 1930, p. 7), and, appealing to

SAYOUS mentions similar cartel organizations of merchants and producers in the Netherlands in the sixteenth and seventeenth centuries.¹

In England, as in France, at first monopolist organizations of corn and provision merchants, butchers, etc., predominated in this period. The proclamation of King Henry VIII, in 1529,² and the cases of the *Court of Star Chamber*,³ plainly show

Chastin, erroneously assumes that this union was actually formed. On the contrary, Chastin (ut sup., pp. 10 et seq.) distinctly states that the administrative authority (*le lieutenant de police d'Argenson*), considering the application of the competitors, opposed the formation of the *planned* organization. "*Lieutenant de police d'Argenson prit parti pour les réclamants et s'opposait à l'organisation projetée. Il y voyait un moyen 'd'augmenter de plus en plus le prix de la viande et d'en diminuer l'abondance dans les marchés par les avis continuels que les directeurs de ce bureau feraient passer en même temps dans toutes les provinces'*" (*Corresp. des Contrôleurs génér., I, p. 485, No. 1739*).

¹ SAYOUS, "Les ententes de producteurs et de commercants en Hollande au XVII^e siècle," *Mémoire lu à l'Académie des sciences morales et politiques*, le 7 Sept., 1901; idem, "Cartels and Trusts in Holland in the Seventeenth Century," *Political Science Quarterly*, 1902, pp. 381 et seq.; idem, "La speculation dans les Pays-bas au XVI^e siècle," *Journal des économistes*, 1901.

² Anno XXI^o Henrici Octavi (1529). *A Proclamation against forestallers and regraters of corne and for prevention of the dearth of graine and for furnishing of the markettes with corne upon payne of forfeiture of the corne forestalled or regreated and ymprisenment of the offenders.*

"The King our sovereigne Lord considering have the great scarcitie of corne and graine and the high prises of the same hath of late risen within this his Realme of England by meanes of such evill disposed persons as doe forestale and regrate the same corne and graine and doe combyne and confeder together in Faïres and markettes to sett unreasonable prises uppon the said corne and graine to the great damage of his loveing subjectes and contrary to divers actes and statutes."

The above proclamation is quoted at full length in the *Select Cases of the Court of Star Chamber* (Selden Society), Vol. II, London, 1911, pp. 288 et seq. Cf. also there pp. 290 et seq., "Draught Bill as to Regrating Butter and Cheese, January, 1534."

³ *Select Cases of the Court of Star Chamber*, ut sup., pp. 168 et seq., *Bareth and others v. Newby*, of the year 1528; pp. 206 et seq., *Bakers, Brewers, etc., of Andover v. Knyght*, of the year 1534, and

that they were a common occurrence in the economic life of England. Among workmen, producers-artisans' monopolistic agreements recurred. They were prosecuted as a *crime of conspiracy*, the mere agreement for the formation of a monopoly was punishable irrespective of whether the monopoly was actually formed and whether the parties to the conspiracy had succeeded in bringing about a rise in prices. The joint action of at least two persons (not being husband and wife) was the essential factor in a conspiracy. It sufficed, however, to ascertain the identity of one accomplice, the others might remain undiscovered.¹

With these traders' monopolies, which the authorities opposed, there were many commercial monopolies, both individual and collective, which owed their existence to royal privileges, notwithstanding the fact that in the year 1602, in the sensational case of *Darcy v. Allin*, the Court condemned all monopolies and ruled that the granting of such privileges is legally inadmissible.² Monopolies were especially

others. A number of instances of monopolies of corn traders, butchers, etc., of the sixteenth century is discussed in the "Introduction" to the second volume of the *Select Cases of the Court of Star Chamber*, pp. 21-134.

¹ WRIGHT, *The Law of Criminal Conspiracies and Agreements*, London, 1873, especially para. 5, "Rule of Seventeenth Century that combination for any crime is punishable" (pp. 26 et seq.), and para. 12, "Examination of cases on combination relating to Trade and Labour. Restraint of Trade and Disturbance of Markets" (pp. 43 et seq.); STEPHEN'S *New Commentaries on the Laws of England*, London, 1908, Vol. IV, pp. 213 et seq.; HARRISON, *Conspiracy as a Crime and as a Tort in English Law*, London, 1924, in particular chapters "The Seventeenth Century" (pp. 13 et seq.) and "Criminal Conspiracy" (pp. 122 et seq.), where Harrison discusses a number of cases of the seventeenth, eighteenth, and nineteenth centuries on restraint of trade, from which he draws the conclusion ". . . that a combination to coerce a man in the bestowal of his industry or capital, without the use of criminal means, is indictable"; HOLDSWORTH, *History of English Law*, Vol. VIII, London, 1925, s. 378 n.; MAKAREWICZ, *Einf. in Phil. d. Strafrechts*, Stgt., 1906, pp. 329 and 436.

² WEBSTER, *Reports and Notes of Cases on Letters Patent for Inventions*, London, 1844, pp. 1-7.

strong among merchants trading with foreign countries, originally with the Low Countries. These organizations, known as *Merchant Adventurers (Regulated Companies)*, were, owing to royal charters, monopolizing the whole of England's foreign trade. Some of them date back to the fourteenth century (e.g. the Company of Merchant Adventurers trading with the Netherlands), or, as is shown by Malynes,¹ even as far back as the middle of the thirteenth century, but it was not until the end of the fifteenth and during the sixteenth centuries that they developed fully. In the latter and the first half of the seventeenth centuries they reached their highest stage of development.²

¹ MALYNES, *Consuetudo vel Lex Mercatoria* . . ., London, 1622, pp. 210 et seq., Chap. XLII, "Of Associations, Monopolies, Engrossings, and Forestallings." As one of the types of monopoly companies "which are properly called Societies" he mentions companies of *Merchant Adventurers* which are of 400 yeares standing or thereabouts, reckoning from the year 1248; when the said Merchants obtained privileges of John Duke of Brabant and were called the *Brotherhood* of Saint Thomas Becket of Canturburie, which were confirmed by King Edward the third, Henry the fourth, Henrie the fifth, Edward the fourth, Henri the sixth, Richard the third, and King Henrie the seventh; who gave them the name of Merchants Adventurers: after him also confirmed by King Henrie the eight, Edward the sixth, Queene Marie, Queene Elizabeth, and lastly by our Sovereigne Lord King James, *not without many enemies and oppositions, and most especially of late, taxing them to be Monopolizers, and unprofitable to the commonwealth.*"

² Of the rich literature on the *Merchant Adventurers' Companies* the most important books are: EPSTEIN, *The Early History of the Levant Company*, London, 1908, an original work on one of the most important companies; DENDY, *Extracts from the Records on the Merchant Adventurers of Newcastle-on-Tyne*, Vol. I, Edinburgh, 1895, Vol. II, Newcastle and London, 1899 (publications of the Surtees Society). The internal organization of the Merchant Adventurers of England and the rights and duties of the members are discussed by LINGELBACH, *The Internal Organization of the Merchant Adventurers of England*, London, 1902. CARR, *Select Charters of Trading Companies*, A.D. 1530-1707 (Selden Society), London, 1913, deals with several of these companies and quoted at full length the royal charters. Interesting observations on *Merchant Adventurers* are to be found in UNWIN-TAWNEY's *Studies in Economic History: the Collected Papers of George Unwin*, London, 1927, pp. 132-220,

These companies, which included wholesale merchants only, were formed on the *territorial* principle, setting aside certain foreign markets for their members. Competition between them was eliminated; each company decided on the markets to be supplied, the quantities of goods, and the time of delivery. They traded chiefly in linen, later also in woollen manufactures. Very often the annual "*stint*" of linen that each member of the Company could export to a given market was fixed in advance. The Companies also regulated the prices of goods to which the members had strictly to adhere. They possessed their own ships, and had store-houses in the various countries. The admission of new members depended on the decision of the Company.

These Companies often had their own chapels and chaplains in foreign countries, common money-chests to defray the various expenses of the Company, and similar arrangements which brought them all the nearer to the old *merchant guilds*. This, however, does not mean, as Sombart assumes, that they sprang from the medieval guild spirit and were, *so to speak, fraternities maintaining preachers abroad at the expense of the company* (1) and *that therefore one must not compare them to the modern cartels*.¹ On the contrary, they were by their

"The Merchant Adventurers Company in the Reign of Elizabeth." A good compact treatment is LIPSON'S, *The Economic History of England*, Vol. II, London, 1931, pp. 196 et seq., and also partly in Vol. I, pp. 488 et seq. CUNNINGHAM, *The Growth of English Industry and Commerce in Modern Times*, Cambridge, 1921, Vol. I, pp. 223 et seq. Interesting contributions to the history of the various privileged monopoly organizations of that period are contained in the book of BLAND-BOWN-TAWNEY, *English Economic History, Select Documents*, London, 1914, pp. 427 et seq.

¹ SOMBART, *Der mod. Karpit.*, 2nd ed., ut sup., II, pp. 79 et seq.: "Will man den Wesenkern dieser neuen Gebilde richtig erfassen, so darf man sie nicht mit den modernen Kartellen vergleichen, sondern muss sie, scheint mir, an die mittelalterlichen Kaufmannsgilden anknüpfen, aus deren Geiste heraus sie doch geboren waren. . . . Es waren doch noch halb und halb Bruderschaften die auf Gesellschaftskosten Prediger im Auslande anstellten."

very nature capitalistic throughout, although for a long time they ingeniously concealed themselves under the cloak of the lawful *fraternities* and *guilds* privileged by the King. A subterfuge to which the capitalistic enterprises of the time often resorted.

They were not missionary brotherhoods which went out to India and other remote continents to disseminate the ideals of the Christian faith, as one might be inclined to think from the way in which Sombart portrayed them. They were organizations of big wholesale merchants, who set out for an economic conquest of the more important world markets with a view to a strictly individual profit and the increase of their own property. Can a more capitalistic aim be imagined? Every modern cartel is such a "*fraternity*" of entrepreneurs in the same branch. When these merchants acted collectively through a strong organization, regulating their sales in the foreign markets and eliminating mutual competition, they did so in order to realize their capitalistic plans more effectively, and not to foster a *craft-spirit* (!) or because they desired to prevent "*the rich eating out the poor.*"¹ They eliminated competition in the first place to enable them to make a common front against the foreigners. Naturally, thereby they secured themselves against losses, which are inevitable in competition. But it was a mutual protection of *all* members of the company, and not a saving of the "*poor*"; it was not likely that the "*poor*" would be found in these organizations, which consisted not of itinerant hawkers, but as a rule *exclusively* of international *wholesale* merchants! It is quite a mistake to speak of the craft-spirit in these companies of merchant-capitalists,² which laid the foundations of the English world trade in America, Africa, and

¹ SOMBART, *ut sup.*, II, p. 77: "Streng war der Absatz geregelt, alles Niederkonkurrieren der Genossen verboten usw. Das Ziel dieser Bestrebungen wie überall, wo Handwerkergeist waltete, war: zu verhindern, dass ('the rich eat out the poor')." *ut sup.*

² LIPSON, *Economic History of England*, Vol. I, "The Middle Ages," pp. 489 et seq.

the East Indies.¹ If that were the case, one might as well say that all modern cartels and trusts, the guiding idea of which is restriction and elimination of competition, are ruled by the *medieval craft spirit*!

Sombart later contradicts himself when he states that the "*craft*" companies *certainly diverged widely on essential points from the medieval guilds and corporations*.² The former did not claim the whole personality of their members, as the old guilds did, but only so far as their common commercial interests were concerned.³ Further, their main object was not the regulation of competition between their members, but the control of the market for their benefit through fixing prices, apportioning quotas of goods, and so on.⁴ The argument miscarries for two reasons. First of all, it is a denial of what a few pages before Sombart rightly stated himself, that *Merchant Adventurers* strictly regulated sale by their members eliminating their mutual competition.⁵ Secondly, the control of a market for one's benefit cannot be carried out, except by regulating the trade, that is to say, the mutual competition of those who desire to gain control over the particular market. One cannot, therefore, disassociate these questions and set them down as essentially different, as Sombart has done.

¹ CUNNINGHAM, *Growth of English Industry and Commerce during the Early and Middle Ages*, Cambridge, 1927, 5th ed., S. 416.

² SOMBART, *ut sup.*, II, p. 80: "Aber freilich, ihre Vereinigung wich in sehr wesentlichen Punkten von den mittelalterlichen Gilden und Zünften ab."

³ Thus the only difference which is adduced as essential in the science of guilds or in cartel literature falls to the ground. See paragraph on guilds on pp. 168 et seq.

⁴ SOMBART, *ut sup.*, II, p. 80: "Sie erblicken ihre Hauptaufgabe nicht mehr in der Regelung der Konkurrenz ihrer Mitglieder untereinander, als vielmehr in der Regelung des Marktes zu ihren Gunsten (Preisfestsetzungen, Kontingentierungen usw.), als womit sie sich allerdings den neuzeitlichen Kartellen nähern." Cf. citation in note 1 on p. 286, ante.

⁵ Cf. note 1, p. 287, ante.

The fact that the cartel trading companies, with aims which were strongly capitalist, made use of the various arrangements of the old craft organization in any particular case, proves not only that there was no essential difference between the craft and capitalist cartels which is the prevalent view, but that, on the contrary, these two organizations must have been very much akin.¹ Cunningham justly remarks that "*as institutions these companies (scil. Merchant Adventurers) form a curious connecting-link between the intermunicipal trade of the Middle Ages and the world-wide commerce of modern time.*"² They correspond essentially to modern cartels monopolizing the export trade. Like cartels of to-day, the Merchant Adventurers were, owing to their monopolist policy having in view only personal gain, especially during the seventeenth century, the target of unceasing attacks by public opinion. The question of outsiders (*interlopers*) opposing companies in the name of the freedom of trade, existed then, just as it does to-day, in the case of cartels and trusts.³ On the other hand, there were voices that extolled the merits of the Merchant Adventurers for regulating effectively the foreign trade of England and eliminating foreign competition, in particular that of the German Hansa.⁴

¹ Cf. the paragraph on guilds on pp. 168 et seq.

² CUNNINGHAM, ut sup., p. 416.

³ LIPSON, ut sup., pp. 491 et seq.

⁴ WHEELER, *A Treatise of Commerce, wherein are shewn the commodities arising by a wel ordered, and ruled trade, such as that of the Societe of Merchant Adventurers is proved to bee, written principallie for the better information of those who doubt of the necessarienes of the said Societe in the State of the Realme of England*, Middelburgh, 1601; PARKER, *Of a Free Trade . . .*, London, 1648, where Parker represents the Merchant Adventurers as a useful institution. As their special merit he emphasizes the development of the clothing trade. Similarly DAVENANT sided with the privileged trading companies in his publications (e.g. *East India Trade*, London, 1696, and another time using the same title in 1697). Against this, however, is MALYNES, *The Maintenance of Free Trade*, London, 1622, who subjected to a severe criticism all monopolies, including the Merchant Adventurers. On p. 54 he says: ". . . *The Merchant Adventurers have an inevitable opportunity of combination to set what price they please upon cloth*

Monopolies based on royal privileges embraced all English industries, particularly the mining industry. Known in the fourteenth century,¹ they became popular later under Queen Elizabeth and Kings James and Charles, who often made use of this system.² The history of these monopolies is too well known in English literature to repeat.³ I should like, however, to point out two facts.

to the clothier, of Wool to the Grower, and of all Commodities exported and imported; *So that this ingrossing of Trade into few men's hands, hath caused our home Trades to decay, our Manufacturers to decrease, and our homebred commodities to lie upon our hands unsold, or to bee sold at a low price . . . and whilst our merchants hinder one another from trade, other Nations increase their owne Manufacturer and enlarge their trade* not only for the said Countries of high and low Germany, but also for Russia, Eastland, Poland, and other places."

Similarly, on the ground of the principle of full freedom of trade, monopolistic trading companies were combated in many anonymous pamphlets, e.g. (11) *England's Great Happiness*, of the year 1677, or *Considerations on the East India Trade*, of 1701.

¹ Cf. p. 143 et seq., ante.

² HIRST, *Monopolies, Trusts and Kartells*, ut sup., p. 17, quotes a characteristic utterance of one of the Members in the House of Commons during the reading of the long list of monopolies granted by Elizabeth: "*Is not bread in the number?*" 'Bread!' cried everyone in astonishment. 'Yes, I assure you,' replied he, 'if affairs go on at this rate we shall have bread reduced to a monopoly before the next Parliament.'"

³ UNWIN, *Industrial Organization in the Sixteenth and Seventeenth Centuries*, Oxford, 1904; PRICE, *The English Patents of Monopoly*, Boston, 1906; LEVY, *Monopoly and Competition, A Study in English Industrial Organization*, London, 1911, and the second enlarged edition of the same book entitled, *Monopolies, Cartels and Trusts in British Industry*, London, 1927. Levy widely discusses also coal monopolies (cartels), which played probably the most important rôle in the English industries; the two former works omitted them. Both of his works originally appeared in German (see index of bibliography). A brief historical account of the cartel movement in the coal industry is given by WILLIAMS, *Capitalist Combination in the Coal Industry*, London, 1924; particularly see Chap. II, pp. 17 et seq., "Early Combinations in the Coal Industry." A number of monopoly companies are originally treated by CARR, *Select Charters of Trading Companies*, A.D. 1530-1707 (Selden Society), London, 1913.

First, the exceedingly interesting relationship of collective monopolies (cartels) which by far preponderated over individual monopolies, to the guild organization. Like the cartel companies of the Merchant Adventurers, the industrial cartels readily made use of the legal form of guilds and eagerly applied for incorporation as guilds. A typical instance of this was the well-known coal cartel in Newcastle-on-Tyne, the most prominent cartel in the English coal-mining industry at that time.¹

Founded in the nineties of the sixteenth century, it covered a group of rich coal-mines in the Newcastle district, where the English coal-mining industry was then concentrated. Originally this was a distinct capitalistic trading company of coal producers and merchants at Newcastle,² who eliminated mutual competition and jointly carried on business under the name "Newcastle Hostmen." I intentionally avoid the expression "firm" because they did not admit the actual cartel character of their trading company, but on the contrary represented their organization as "*fraternitas*." This was quite

¹ This is carefully treated by the following writers after first-hand researches: DENDY, *Extracts from the Records of the Company of Hostmen of Newcastle-on-Tyne* (publication of the Surtees Society), Edinburgh, 1901; BRAND, *History and Antiquities of the Town and County of Newcastle-on-Tyne, including an Account of the Coal Trade of that Place*, London, 1789, Vol. II, pp. 241 et seq. (To what has been said in note 2 on p. 285, I should like to add that also Brand deals exhaustively with the Company of the Merchant Adventurers of Newcastle (Vol. II, pp. 217 et seq.); GARDINER, *England's Grievance Discovered in Relation to the Coal Trade*, London, 1655 (a contemporaneous criticism of the cartel); DUNN, *View of the Coal Trade of the North of England*, Newcastle-upon-Tyne, 1844; GALLOWAY, *History of Coal-Mining in Great Britain*, London, 1882, Chap. IV, "Combination among the Coal-Owners at Newcastle"; LIPSON, *ut sup.*, Vol. II, pp. 128 et seq.: "The outstanding feature of the coal trade in the sixteenth, seventeenth, and eighteenth centuries was the tendency to form combinations and 'rings' among the producers and distributors."

² WILLIAMS, *ut sup.*, p. 19: "This, like most of the companies formed in the sixteenth century, was a purely capitalistic concern."

intelligible in those days. While the former was bitterly hated by public opinion and condemned and prosecuted by law, the second was still privileged in the opinion of the majority as an ideal of Christian economic ethics and human brotherhood. Neither the name of a fraternity nor its form proved an obstacle for the cartel in the pursuance of its monopolist policy.

When, however, exorbitant cartel prices began to drive hard on the consumers, and protests and complaints in Parliament became more and more frequent, the cartel *fraternity* of Newcastle adapted itself to the spirit of the time and secured an official grant incorporating it as a *guild*.¹ In return for a comparatively high share in the profits of the cartel (one shilling on each chaldron of coal exported), on March 22, 1600, Queen Elizabeth by Charter incorporated the cartel as a *guild*, conceding to it the exclusive right of selling coal for shipment.² As a guild the cartel was legally protected against all external competition. The few outsiders who owned collieries were quite harmless, as they could export coal only through the medium of the guild. Internal competition between the cartel members was removed by determining for each member the exact coal quota he could dispose of during a certain period of time and by fixing a uniform coal price binding all the members.³

Moreover, there was a moral advantage in it. The cartel, as the "Hostmen's Guild," was no longer in the eyes of society a criminal monopoly, held by greedy and selfish individuals, but became a guild credited by the majority with the reputation of the ideal form of organized industry and commerce,

¹ DUNN, *ut sup.*, pp. 13 and 21 et seq., shows that the first years of the existence of the cartel the coal price rose about 50 per cent., which aroused unceasing accusations of "*ingrossing and cornering*" against the cartel; BRAND, *ut sup.*, pp. 269 et seq.

² DENDY, *ut sup.*, pp. 10 et seq., quotes a copy of the privilege of Elizabeth dated March 22, 1600. On p. 11 we read: "The foresaid guilde or fraternitie of the hoastmen of the towne of Newcastle-on-Tyne from henceforth for ever shall and maie be one bodie corporate and politick."

³ BRAND, *ut sup.*, p. 273.

an institution permeated with altruism, brotherly love for one's fellow creatures, and an ardent desire that, to use the expression of Sombart, "*the rich did not eat out the poor.*"

Such an opinion of the colliery owners' guild would undoubtedly have taken root had it not been for the fact that the cartel, having the law on its side, forced up prices, thus merely irritating public opinion, as was shown by violent attacks in Parliament and literature.¹ But with the support of the Crown, which could not consider giving up such an important source of revenue, this *guild-cartel* was always finding a way round the anti-monopolist statutes,² and it was not until 1679 that the renewal of the privilege was withheld. But even then and later its influence on the coal market made itself felt.³

It was, undoubtedly, under the pressure of public opinion that in 1664 a law was issued regulating the measure and prices of coal.⁴ The Lord Mayor of London and the Justices of the Peace in the counties were empowered to fix coal prices at their discretion. According to paragraph II of this Act, ". . . if any ingrosser or retailer of such coals shall refuse to sell as afore-said, that then the said Lord Mayor and aldermen and justices

¹ GARDINER, *England's Grievance Discovered in Relation to the Coal Trade*, Newcastle, 1655, p. 49, pp. 60 et seq., and 204 et seq. The coal price rose at that time by nearly 100 per cent. On p. 205 Gardiner says: "*The poor in these later years have found it a hard matter to fortify themselves against cold.*" Under the influence of the continual complaints of consumers, a special commission in Parliament introduced a bill for the abolition of this guild. Though passed by the House, it never became an Act of Parliament (Gardiner, ut sup., p. 124); DENDY, ut sup., pp. 19 et seq.

² In the Statute of 1624 against monopolies, among many other exceptions, the Newcastle guild also was exempted from its provisions (21 Jacob I, Cap. 3, XII).

³ CUNNINGHAM, *Growth of English Industry and Commerce in Modern Times*, ut sup., Vol. I, p. 528; also BRAND, ut sup., Vol. II, p. 298; DENDY, ut sup., p. 139. According to LEVY, ut sup., p. 28, and WILLIAMS, ut sup., p. 22, the *Hostmen's Gild* officially ceased to exist much earlier, in 1665.

⁴ Anno 16 and 17 Caroli II, Cap. II, *An Act for regulating the measures and prices of coals.*

of peace respectively are hereby authorized to appoint and empower such officer or officers, or other persons as they shall think fit, to enter into any wharf, or other place where such coals are stored up; and in case of refusal, taking a constable to force entrance, and the said coals to sell, or cause to be sold, at such rates as the said Lord Mayor and aldermen and justices respectively shall judge reasonable, rendering to such ingrosser or retailer the money for which the said coals shall be so sold, necessary charges being deducted. . . ."

Like all laws of this kind since the earliest times, this law also proved a failure in practice. It showed itself helpless against the growing coalition movement among coal producers and merchants. There is no evidence in history that it ever had any practical importance worthy of note.

The case of the coal cartel at Newcastle was not isolated. A number of industrial and commercial cartels, for similar reasons, based their existence on the guild organization. This was all the easier because the Statute of Monopolies of 1624 expressly exempted all municipal corporations and companies, both industrial (of artisans) and commercial, from its provisions and allowed the King to grant such privileges. Of this benefit the King was making eager use.¹ The above fact is a valuable contribution to a right understanding of the old guilds and handicrafts.

Along with these *guild cartels* a number of other monopolies in mining (tin, copper, lead, silver, alum, salt, etc.) and manufacturing (glass, soap, wire-drawing, etc.),² realized the aims

¹ 21 Jacobi I, C. 3, IX. Cf. note 2 on p. 292 and note 2 on p. 293; UNWIN, *Industrial Organization*, ut sup., pp. 17 and 126 et seq.; LEVY, *Monopolies, Cartels, and Trusts in British Industry*, ut sup., pp. 38 et seq. In connection with this see also the chapter on monopolies in the excellent book of UNWIN, *The Guilds and Companies of London*, London, 1925, 2nd ed., pp. 293 et seq., and partly also Chap. XIV, "Government of the Companies," pp. 218 et seq., and Chap. XV, "Industrial Expansion under the Tudors," pp. 243 sqq.

² PRICE, *The English Patents of Monopoly*, ut sup., pp. 49 et seq. On pp. 142 et seq., Price gives copies of many authentic documents

of this monopoly policy through the capitalist organization of trading companies. The patent clause of the Statute of 1624 allowing the Crown to grant to private persons letters patent for sole use or sale of new inventions,¹ formed the basis for monopoly privileges. Beside the clause on municipal corporations, mentioned above, this was another loophole, which enabled the Crown to evade the severe monopoly provisions of the Statute of Monopolies, which was, therefore, of no practical value. In opposition to the explicit intention of the Statute, no attention was ever paid to the question of whether the invention was really new, or whether it constituted an invention at all. When it was in the interest of the Crown to grant a monopoly Charter, it was presumed on the slightest pretext that the patent applied for was an invention. *Patentee and monopolist* became in general usage synonymous expressions.¹

The increasing protests in a Parliament hostile to the monopoly favouring policy of the Crown, as well as its assurances of correction made in the various proclamations suspending monopolies, afforded no remedy.³ It is no wonder

(privileges, manuscripts, etc.) referring to these monopolies. A chronological list of the authentic documents (manuscripts) concerning many industrial companies in London of the sixteenth and seventeenth centuries is given by UNWIN, *ut sup.*, pp. 253 et seq. The book of Webster, *Reports and Notes of Cases on Letters Patent for Inventions*, London, 1844, is based on first-hand researches and contains valuable material.

¹ 21 Jacobi I, Cap. 3, V. Cf. p. 294, ante, *Reports and Notes of Cases on Letters Patent for Inventions*, London, 1844.

² LEVY, *ut sup.*, p. 19: "The use of the clause as to patents for purposes of monopoly was so general that the word 'patentee' meant in the period from 1630 to 1650 'monopolist.'"

"The Monopolist and the Patentee
Did joyne hand as here you see"

is the legend under the frontispiece to an anti-monopolist pamphlet of 1642."

³ PRICE, *ut sup.*, pp. 156 et seq., "Elizabeth's Proclamation concerning Monopolies, November 28, 1601"; p. 163, "Proclamation of James I suspending Monopolies, May 7, 1603"; pp. 166 et seq.,

of peace respectively are hereby authorized to appoint and empower such officer or officers, or other persons as they shall think fit, to enter into any wharf, or other place where such coals are stored up; and in case of refusal, taking a constable to force entrance, and the said coals to sell, or cause to be sold, at such rates as the said Lord Mayor and aldermen and justices respectively shall judge reasonable, rendering to such ingrosser or retailer the money for which the said coals shall be so sold, necessary charges being deducted. . . ."

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The case of the coal cartel at Newcastle was not isolated. A number of industrial and commercial cartels, for similar reasons, based their existence on the guild organization. This was all the easier because the Statute of Monopolies of 1624 expressly exempted all municipal corporations and companies, both industrial (of artisans) and commercial, from its provisions and allowed the King to grant such privileges. Of this benefit the King was making eager use.¹ The above fact is a valuable contribution to a right understanding of the old guilds and handicrafts.

Along with these *guild cartels* a number of other monopolies in mining (tin, copper, lead, silver, alum, salt, etc.) and manufacturing (glass, soap, wire-drawing, etc.),² realized the aims

¹ 21 Jacobi I, C. 3, IX. Cf. note 2 on p. 292 and note 2 on p. 293; UNWIN, *Industrial Organization*, ut sup., pp. 17 and 126 et seq.; LEVY, *Monopolies, Cartels, and Trusts in British Industry*, ut sup., pp. 38 et seq. In connection with this see also the chapter on monopolies in the excellent book of UNWIN, *The Guilds and Companies of London*, London, 1925, 2nd ed., pp. 293 et seq., and partly also Chap. XIV, "Government of the Companies," pp. 218 et seq., and Chap. XV, "Industrial Expansion under the Tudors," pp. 243 sqq.

² PRICE, *The English Patents of Monopoly*, ut sup., pp. 49 et seq. On pp. 142 et seq., Price gives copies of many authentic documents

of this monopoly policy through the capitalist organization of trading companies. The patent clause of the Statute of 1624 allowing the Crown to grant to private persons letters patent for sole use or sale of new inventions,¹ formed the basis for monopoly privileges. Beside the clause on municipal corporations, mentioned above, this was another loophole, which enabled the Crown to evade the severe monopoly provisions of the Statute of Monopolies, which was, therefore, of no practical value. In opposition to the explicit intention of the Statute, no attention was ever paid to the question of whether the invention was really new, or whether it constituted an invention at all. When it was in the interest of the Crown to grant a monopoly Charter, it was presumed on the slightest pretext that the patent applied for was an invention. *Patentee and monopolist* became in general usage synonymous expressions.¹

The increasing protests in a Parliament hostile to the monopoly favouring policy of the Crown, as well as its assurances of correction made in the various proclamations suspending monopolies, afforded no remedy.³ It is no wonder

(privileges, manuscripts, etc.) referring to these monopolies. A chronological list of the authentic documents (manuscripts) concerning many industrial companies in London of the sixteenth and seventeenth centuries is given by UNWIN, *ut sup.*, pp. 253 et seq. The book of Webster, *Reports and Notes of Cases on Letters Patent for Inventions*, London, 1844, is based on first-hand researches and contains valuable material.

¹ 21 Jacobi I, Cap. 3, V. Cf. p. 294, ante, *Reports and Notes of Cases on Letters Patent for Inventions*, London, 1844.

² LEVY, *ut sup.*, p. 19: "The use of the clause as to patents for purposes of monopoly was so general that the word 'patentee' meant in the period from 1630 to 1650 'monopolist.'"

"The Monopolist and the Patentee
Did joyne hand as here you see"

is the legend under the frontispiece to an anti-monopolist pamphlet of 1642."

³ PRICE, *ut sup.*, pp. 156 et seq., "Elizabeth's Proclamation concerning Monopolies, November 28, 1601"; p. 163, "Proclamation of James I suspending Monopolies, May 7, 1603"; pp. 166 et seq.,

that it proved a difficult matter to change a policy which was closely connected with capitalistic commerce and which sprang from its very nature, from the unceasing effort to make profit by all available competitive means among which monopoly always held a prominent place. The fact that kings and dukes indulged in this natural passion in order to assist their finances, usually in a precarious state, could be observed wherever industry and commerce was highly developed and stronger competition held sway. Aristotle spoke of statesmen who founded their policy on monopolies as of common occurrence. The same was true of the Roman State (the constitution of Zeno).¹

It was the same in medieval Italy, where commerce was strongly developed; to some extent also in France, whenever occasion arose (the salt cartel, 1301, of King Philip the Fair). And the Pope in his States formed no exception to the rule (the alum cartel, 1470). Later the same policy was pursued by the German Emperors and dukes. And it could not be otherwise in England, since the rapid growth of industry and commerce and intensified competition formed ideal conditions for various monopolies. The conditions in other countries are by no means so well known as those in England in the sixteenth and seventeenth centuries, hence it might be that the latter appear perhaps extremely unusual. But from what we know of the situation in other countries earlier and contemporaneous with the English conditions, it is plain that the monopoly movement was always and everywhere protected by the rulers, whenever they found that it would prove to be a new source of revenue. Consequently there is no reason why conditions in

"Proclamation of James I touching Grievances, July 10, 1622"; pp. 173 et seq., "Proclamation of Charles I revoking certain Patents and Commissions, April 9, 1639."

¹ Caesar ZENO was compelled to declare void all monopolies granted or which might have been granted by his successors. The latter, however, continued to confer these on a still larger scale.

England in those days should have been exceptional, as some would maintain. Thus we come to the second factor in the English monopolies of the sixteenth and seventeenth centuries to which I should like to draw attention.

Comparing the English monopolies of the age of Elizabeth, James I, and Charles I with contemporaneous conditions in Germany, Professor Levy categorically states that Germany has never had so uniform a system of monopoly as that existing in England under Elizabeth, James I, and Charles I. The peculiarities of particular trade privileges alone made that impossible. *The phenomenon of a prince attempting systematically to unite industry wherever possible in great national monopolies was unknown. The princes did not play the part of eagerly speculative "Promoters" of capitalist undertakings, while personal enrichment and the trade interests of courtiers so widespread in England* never had a decided influence on the monopolist organization of German industry. Perhaps it is just for the reason that these sinister sides of the system were unknown, that it remained longer in existence than in England and was abolished without leaving such general hatred behind it.

This statement is repeated throughout all the four editions of his work on English monopolies, cartels, and trusts.¹

On the contrary, as we have already seen, the original investigations of historians, in particular of Professor Strieder, show that actually in Germany the monopoly movement presents almost a hundred years earlier the same picture as we see in England in the seventeenth century.² The controversy between

¹ Literally the same as above in the book, *Monopolies, Cartels, and Trusts in British Industry*, London, 1927, p. 73. This is only an enlarged second edition of his first work, *Monopoly and Combination*. Likewise in the second German edition, 1927.

² It is worth while noting that the lateness of the monopoly movement in England was in no small degree the result of the stronger and more rapid expansion of German industry and commerce in the English market than the English in the German. German merchants appear in the English market as early as the twelfth century, and followed by the French and Italian, led the foreign invasion, and

the Reichstag and public opinion, both opposed to monopolies, on the one hand, and the policy of the German Emperors and Dukes favouring monopolies on the other hand, the causes underlying such a policy, i.e. the desire of the rulers to improve their embarrassed finances by means of loans, sharing the profits with the monopolists, etc., the arguments adduced to expiate this practice, such as the benefit of a given industry or commerce, public welfare, well-being of the country, etc., are all merely counterparts to the happenings in England.

The sole difference was the circumstance that in Germany the support given to monopolies was more open. In England the monopolies were almost always *formally* lawful. They were based on the law, either on the patent clause or other exceptional provisions of the Statutes, although with the aid of a very loose and extensive interpretation. In Germany, however, the practices of kings and dukes were most decidedly unlawful, it was a systematic violation of their own monopoly laws which as a rule made no exceptions. Hence the attempts to legalize them, in particular that of the Emperor Charles V, with regard to the largest and most important group of mining monopolies (*the Mandate of Toledo*!) Hence their liberality in giving these famous "*safe-conducts*" (*Majestates Schutzbriefe*) and the frequent interventions of the Emperor with the authorities for the monopolists who were called to account *only after them* came the Jews! (CUNNINGHAM, *Growth of English Industry and Commerce during the Early and Middle Ages*, ut sup., pp. 194 et seq.; BRENTANO, *Geschichte der wirtschaftlichen Entwicklung Englands*, Jena, 1927, II, pp. 362 et seq.). A German merchant was the first, so far as is known, to obtain a monopoly privilege in the English mining industry (cf. p. 197, ante). Among the English monopolists also of the sixteenth and eighteenth centuries we often find German merchants—for instance, the Höchstetters, who had gained experience in their own country, and would rather teach the English kings in this respect than learn from them. The merchants, the majority of whom were Germans, built up the English monopoly system, and not Queen Elizabeth. She and her successors merely executed and legalized the monopoly plans of those merchants. Cf. also pp. 290 et seq., ante.

for their practices. The Emperor and the Dukes often directly took part and urged the formation of monopolies. In England, as a rule, this practice is not found.

Levy did not consider those historical facts, and therefore arrived at conclusions which cannot be reconciled with them.

Closer attention to the monopolist organizations of the sixteenth and seventeenth centuries is given by Professor SOMBART, when he discusses the formation of market prices in the well-known book, *Der moderne Kapitalismus*.¹ Considering the wide circulation of this book (six editions since 1902) and the influence it had on the further development of this science, I have thought it advisable to devote more space to its line of argument. Side by side with individual monopolies granted to single, privileged undertakings, Sombart places collective monopolies, in which he distinguishes three groups: (a) *price conventions* of manufacturers; (b) *regulated companies* fixing prices; and (c) *price-fixing* rings of merchants.

By *price-fixing conventions* (*Preiskonventionen*) Sombart means all older cartels, which he singles out under the influence of Strieder,² and does not bring under the common term of *rings*, as till not so long ago all writers did, and as is still done by the overwhelming majority of writers. Sombart admits that old cartels resembled in external features our cartels and syndicates; nevertheless, he is not inclined to associate the two. In his opinion, *the former sprang naturally from an essentially different spirit*: to-day cartels are formed because there is too much competition, formerly they were the result of insufficient competition.³ In connection with this Sombart maintains that

¹ SOMBART, *Der moderne Kapitalismus*, München, 1924, 2nd ed., Vol. II, pp. 195 et seq. and 206 et seq.

² STRIEDER, *Studien zur Geschichte kapitalistischer Organisationsformen*, ut sup. In the first edition of Sombart's *Der moderne Kapitalismus*, Leipzig, 1902, there is no mention of the existence of older cartels.

³ SOMBART, ut sup., Vol. II, p. 206: "*Preiskonventionen* gewerblicher Produzenten, die sich äusserlich unsern Kartellen und Syndikaten nähern, aber natürlich aus grundsätzlich anderem Geiste geboren sind:

as bear speculation (*à la baisse* for a fall) was quite unknown formerly, there could be no influencing of prices downwards. On the contrary, in the sixteenth and seventeenth centuries we often meet with efforts to raise prices, or to keep them up.¹ It is just in the cartels of that time that these tendencies were manifested. In the English Regulated Companies and Rings, therefore, Sombart treats them as co-ordinated methods of artificially influencing prices.² The conception of cartels (price-conventions) he limits to producers only, whereas the regulated companies and rings he represents as exclusive organizations of merchants. In the paragraph treating on rings Sombart further states that they did not arise, in the main, until the sixteenth century, and were formed owing to the disproportion existing between the *capital resources* speedily accumulated by a few merchants through mining and financial

entstehen die heutigen Kartelle, so könnte man es ausdrücken, weil zu viel Konkurrenz da ist, so die der frühkapitalistischen Epoche, weil es zu wenig Konkurrenz gab."

¹ SOMBART, *ut sup.*, Vol. II, p. 206: "Da es keine *à la baisse*-Spekulation gab, so konnte es auch keine Beeinflussung der Preise nach unten hin geben, wohl aber begegnen wir Bestrebungen, die Preise künstlich zu steigern oder hochzuhalten. Ja die letzten Jahrhunderte der frühkapitalistischen Epoche, insbesondere das 16. und ein Teil des 17. Jahrhunderts, sind überreich an solchen Bestrebungen, die in der Monopolbildung und Fikkerei im zweiten Drittel des 16. Jahrhunderts nur ihren Bekanntesten, weil lautesten Ausdruck fanden, die aber in anderen Formen auch sonst häufig auftraten."

² Sombart discusses them in one section under the title "Die künstliche Beeinflussung der Preise." It is worth noting that for the same reasons Sombart considered old monopolies as *natural* and the modern ones as artificial. SOMBART, *Der mod. Kap.*, 1st ed., Leipzig, 1902, Vol. II, pp. 425 et seq.: "Solche Monopolstellungen können wir uns heute nur noch als künstliche Gebilde, d. h. als gewollte Verabredungen oder Vereinbarungen vorstellen, sei es in Form von Patenterteilungen, sei es in Form von Kartellen; es hat aber eine Zeit gegeben, in denen die gewerblichen Produzenten, sagen wir eine natürliche Monopolstellung einnahmen, sei es wegen Mangel an geeigneten Produzenten überhaupt, sei es wegen der gering entwickelten Produktivität der Arbeit oder der Unmöglichkeit einer Dislocierung der Produkte."

operations, and the scarcity of goods coming to the markets. Moreover, these merchants still had the advantage of the monopoly privileges.¹ Indeed, this cause tallies with those adduced before: absence of sufficient competition and too scanty supplies.

Our contemporaneous cartels Sombart treats also as a mode of *artificially* influencing market prices.² The essential difference between old and modern cartels is the different causes of origin: then competition was lacking, now we have too much. He offers, however, *no* evidence in support of this assertion. The history of the cartels as represented above, which Sombart completely ignores, shows that almost all cartels in old days, as is the case with those of to-day, were the result of a keen competitive struggle which brought down the profits of producers and merchants. Sombart's assertion that speculation for a fall was quite unknown is inaccurate. Competition as a rule makes use of bear speculation as the most effectual means of beating rivals. As a matter of fact, such speculations often preceded the formation of old cartels,³ as it does to-day. In proportion to the stage of development of the industry and commerce of the day—only in such a way can one judge these phenomena—competition of old was by no means weaker than under present economic conditions; as an example, many cartels were obviously formed in various branches of industry and commerce as the sole means of arresting a further decline in prices caused by fierce competition. We see further how all the old cartels, in a much higher degree than those of to-day, independently of interference by State authorities, frequently brought to an end a longer or shorter existence and voluntarily

¹ SOMBART, *Die künstliche Beeinflussung der Preise*, Vol. II, p. 207: "Sie entstanden insbesondere im 16. Jahrhundert infolge des Missverhältnisses, das obwaltete zwischen den durch Bergbau und Finanzoperationen rasch gestiegenen Geldvermögen einiger Kaufleute zu der Kleinheit der auf den Markt kommenden Warenmengen."

² SOMBART, *ut sup.*, Vol. III, München, 1927, pp. 530 et seq.

³ Cf., e.g., pp. 132, 134, 153, ante.

renounced the advantages which their monopolist position on the market undoubtedly afforded. The same competitive fight that brought them together split them asunder, but sooner or later, after a new test of strength, to revert to monopoly. There was no lack of competition in any period.

The mistaken thesis of Sombart, which, unfortunately, has already found a follower¹ in the cartel literature, appears to be connected with the theory in the science of economics professed with particular fervour by Sombart that modern capitalism did not begin until the close of the fifteenth century (early capitalism, *Frühkapitalismus*), which developed into full capitalism in the middle of the nineteenth century (beginning of the so-called zenith of capitalism, *Hochkapitalismus*).² The postulate from which he starts is itself correct: to be able to speak of "capitalism" there must at least be a capitalistic enterprise, if only in a chrysalis stage;³ unfortunately, all his further assertions and conclusions do not stand the same criticism.

Capitalist enterprise intended for profit, that is merchandising in the modern significance, did not appear, according to Sombart, until the close of the fifteenth century, and reached maturity in the course of the sixteenth and the first half of the seventeenth centuries. Previously it had been *handicraft* only, *merchant-artificers*, who practised commerce as a *handicraft*.⁴ Sombart is so deeply convinced of the absolute accuracy of his statement, he considers it so clear and indisputable, that

¹ On the mistaken theory of Sombart, Professor LEHNICH based his thesis that old cartels are the outcome of the fact that demand exceeded supply. This is, according to him, the essential difference between them and the modern ones. Cf. p. 98, ante.

² SOMBART, ut sup., Vol. II, pp. 8 et seq. and 14.

³ SOMBART, ut sup., Vol. II, p. 6: "Mit einem Wort: das Mindeste, was vorhanden sein muss, damit wir von 'Kapitalismus' reden können, ist eine kapitalistische Unternehmung, wenn auch erst im Puppenstande."

⁴ SOMBART, ut sup., Vol. II, pp. 99 et seq. (Kap. X, "Die Entstehung der kapitalistischen Unternehmung"). Cf. also Vol. I, Kap. XVIII, "Der Handel als Handwerk," and pp. 320 et seq.

the contrary opinion puts him off his balance. Against those who fix, in the Middle Ages and earlier, the beginnings of capitalistic enterprise and capitalism, he breaks out into invective with such expressions as "fools," "visionaries," etc.¹ And in indulgent vein he adds that "he has formerly issued a warning against dating these beginnings (of capitalism) too far back."²

It was, however, the malicious irony of fate that one of these "fools" whom Sombart warned against misplacing the beginnings of capitalism too early was once—Sombart himself. In the first edition of his work *Der moderne Kapitalismus* he, not less categorically than now, fixed the beginnings of capitalism at a date almost three hundred years earlier than that which he has now chosen as its date of birth. And how ingeniously he described the date! He connected it with a book of LEONARDO PISANO (*Libber Abbaci*) published in the year 1202, which was the first foundation for capitalist business calculations.³ He says: "*It is certain that the year 1202 is a turning-point in the history of the world! Further, literally: 'And if one has to fix the year of birth of modern capitalism, I would not hesitate*

¹ SOMBART, *ut sup.*, p. 291: "Es gibt in der Tat nichts Törichtereres, als das Mittelalter mit kapitalistisch empfindenden und ökonomisch geschulten Kaufleuten zu bevölkern."

² SOMBART, Vol. II, p. 7: "*Ich habe schon früher davon gewarnt, diese Anfänge in eine allzu frühe Zeit zu verlegen. Es ist geradezu phantastisch, in der Karolingerzeit von Kapitalismus zu sprechen, wenn man diesem Worte einen irgendwelchen vernünftigen Sinn beimisst. Es ist aber auch eine Spielerei, in dem Venedig des 12. Jahrhunderts einen ausgebildeten Kapitalismus zu vermuten. Zu solchen sinnlosen Vorstellungen kann man nur kommen, wenn man von vornherein auf eine irgendwelche klare Begriffsbestimmung verzichtet.*"

³ SOMBART, *Der mod. Kap.*, Leipzig, 1902, Vol. I, pp. 391 et seq.: "Was geschaffen werden musste, war erstens eine Methode zur exakt genauen rechnerischen Feststellung jedes einzelnen Geschäftsfalles und zweitens eine Methode zur systematischen Erfassung eines geschäftlichen Gesamtunternehmens."

"... Mit Leonardo Pisano, der selbst aus kaufmännischem Geiste heraus sein unsterbliches Werk geschaffen hat, wird die Grundlage für die exakte Kalkulation gegeben."

to mark as such the year 1202!"¹ In another place Sombart states that with the finance of Pope Innocent III (1198-1216), which was developed into an impressive system as early as the thirteenth century, the beginnings of all modern finance are linked.² He expresses the view that there is no doubt that in the Italian towns at the beginning of the fourteenth century and the towns of Southern Germany at the beginning of the fifteenth century commerce bore a distinctly capitalist imprint.³

If one compares this with what Sombart wrote on the origin of capitalism in the second edition, one can scarcely believe that it was written by the same author, by a historian of economics. Pisano's *epoch-making* book and the decisive year 1202 vanished without trace in the second edition. Pisano was no more worth mentioning. Sombart passed all this over in bashful silence, and not without good reason: he thought it better not to refer again to this "discovery." The whole medieval commerce, even the Italian, which is well known for its capitalist structure, he now represents, contrary to what his previous contention, as a *craft*.⁴ Over these three centuries, as if they were three years, Sombart leaps with a bravado seldom encountered in science, inveighing as he does so against all those who do not share his erroneous opinions.

¹ SOMBART, ut sup., Vol. I, p. 392: "*Sicher ist, dass das Jahr 1202 einen Wendepunkt in der Weltgeschichte bedeutet. Und will man schon ein Geburtsjahr des modernen Kapitalismus ansetzen, so würde ich Nicht zögern, das Jahr 1202 als solches zu bezeichnen.*"

² SOMBART, ut sup., Vol. I, p. 237: ". . . bereits im 13. Jahrhundert wird das päpstliche Finanzwesen zu dem imposanten Systeme ausgebildet, das wir aus der späteren Zeit kennen. *Die Anfänge des päpstlichen (und damit allen modernen) Finanzwesens gehen, wie bekannt, auf die Massnahmen Innocenz III (1198-1216) zurück.*"

³ SOMBART, ut sup., Vol. I, p. 399: "*Es kann gar keinem Zweifel unterliegen, dass der Handel in den italienischen Städten seit dem 14. Jahrhundert in den süddeutschen Städten seit dem 15. Jahrhundert ein stark kapitalistisches Gepräge trugen.*"

⁴ SOMBART, ut sup., 2nd ed., Vol. II, p. 8: "*Im grossen ganzen bewegt sich selbst der italienische Handel das ganze Mittelalter hindurch in handwerksmässigen Bahnen.*" See also Vol. I, pp. 836 et seq.

It is not to be wondered at, therefore, that the scientific method of Sombart and his way of expressed opinions should have shaken the composure of even so eminent a man as the late senior of the German historians of economics, Professor BRENTANO. Brentano, showing the absolute groundlessness and error of Sombart's theory on the genesis of capitalism, was carried away with anger, and said in plain language what he thought of the scientific value of Sombart's book.¹ In this case one could apply to Professor Sombart the well-known proverb: "he who lives by the sword perishes by the sword."

In the valuable work, *Die Anfänge des modernen Kapitalismus*,

¹ BRENTANO, *Die Anfänge des modernen Kapitalismus*, München, 1916, p. 160: "Das Buch ist voll der Frivolitäten eines sich als Übermensch fühlenden Übermütigen, der die Seifenblasen seiner Laune dem durch Geistreicheleien verblüfften Leser mit souveräner Verachtung ins Gesicht bläst und dazu von ihm verlangt, dass er seine Einfälle als 'unwiderleglich richtige' wissenschaftliche Sätze annehme."

Brentano had in mind here the book of Sombart, *Die Juden und das Wirtschaftsleben*, Leipzig, 1911, which in its time caused much stir. In this book Sombart abandoned his previous theory of the year 1202 being the "turning-point in the history of the world" (*Wendepunkt in der Weltgeschichte! Geburtsjahr des Kapitalismus!*) because he had discovered that in that year Leonardo Pisano had written a witty textbook on accountancy. Indirectly, he had there already fixed the beginnings of capitalism at three hundred years earlier, and linked them chiefly with the years 1495 and 1497, and with the expulsion of the Jews from Spain and Portugal (pp. 15 et seq.). With no little literary effect Sombart says there: "*Wie die Sonne geht Israel über Europa: wo es hinkommt, spriest neues Leben empor, von wo es wegzieht, da modert alles, was bisher geblüht hatte!*" In the Jews Sombart sees the real originators of the capitalistic structure and modern forms of economic life (p. 24).

It will be to the lasting credit of Brentano that over these, let us say for brevity, *Jewish* causes of the origin of capitalism (a thick volume of almost 500 pages) Sombart later drew a thick curtain (2nd ed. of *Der mod. Kap.*), and found for himself, at the end of the fifteenth and the beginning of the sixteenth centuries, more suitable "essential" causes for the origin of capitalism. On the Jews there is only a modest remark as one of the more remote causes of the rise of capitalism. See *Der moderne Kapitalismus*, München, 1924, Vol. II, p. 10.

Brentano shows that capitalism existed as far back as the States of Antiquity; and after the fall of the Western Empire, when a cartel system became established in the Western countries, it existed uninterruptedly in the Byzantine Empire, from whence it radiated towards the West, and where, during the Middle Ages, the *old* capitalist system was steadily returning as so-called *modern* capitalism.¹ In the seaport towns of Italy, which were in business relations with the Eastern countries, capitalism never disappeared.² Brentano rightly emphasizes that it is *in commerce* that we first meet with *profit made in a capitalistic way*, because in commerce goods are bought, not to be used, but to be sold at a higher price. The Phoenicians, therefore, being the first merchants, possessed a developed capitalistic system.³ The unlimited striving after gain, which Sombart too rightly calls "the capitalistic spirit," distinguished also the Greeks of the time of Homer. With the Hellenization of the ancient world this spirit made its way to all nations.⁴

It is to be regretted that these clear, convincing, and adequately proved expositions of Brentano could not convince Sombart. True, some of his older material evidence with which he linked the birth of capitalism, and which Brentano stigmatized as sheer nonsense (e.g. the story of the epoch-making book of Pisano, 1202,⁵ or the fable of the Jewish capitalist sun under which capitalism sprang up at the close

¹ BRENTANO, *ut sup.*, p. 7: "Wenn ich von modernem Kapitalismus spreche, meine ich den Kapitalismus, der sich im Abendlande mit dem Wiedererwachen der Geldwirtschaft im Mittelalter entwickelt hat. Im Gebiet des byzantinischen Reiches, im ptolomäischen Ägypten und nach dem zweiten punischen Kriege in Rom entwickelt hatte, nie untergegangen, und auch der Kapitalismus des Abendlands hat sich nur als Fortsetzung und Übertragung des im byzantinischen Reiche fortbestehenden Kapitalismus der alten Welt nach Italien und anderen abendländischen Gebieten entwickelt."

² BRENTANO, *ut sup.*, p. 21. Cf. also p. 117, ante.

³ BRENTANO, *ut sup.*, pp. 14 and 199. Cf. also the later work, *Das Wirtschaftsleben der antiken Welt*, Jena, 1929, p. 179.

⁴ BRENTANO, *ut sup.*, *Die Anfänge des mod. Kap.*, p. 199.

⁵ Cf. p. 303, ante.

of the fifteenth and in the sixteenth centuries like mushrooms after rain),¹ disappeared, passed over in discreet silence. But the theory itself, of the genesis of capitalism at the close of the fifteenth and beginning of the sixteenth centuries, remained. With admirable stubbornness he repeats it in the latest edition of his book, *Der moderne Kapitalismus*,² thus disturbing unnecessarily the clear picture produced by history, which demonstrates something entirely different. The whole of the comprehensive, pointed, and crushing criticism of Brentano was dismissed by Sombart in one insignificant remark: "*Contra (viz. against his theory) L. Brentano advancing the old arguments long since refuted.*"³

There is little hope consequently that the later excellent work of Brentano, *Das Wirtschaftsleben des antiken Welt*, which appeared after the last edition of Sombart's book on modern capitalism, will cause Sombart to change his standpoint. Brentano shows there that a system of capitalist economy existed in various States of Antiquity."⁴ He repeats correctly that it always originated in commerce.

It would be overstepping the limits of this work to go deeper into the problem of the origins of capitalism. Besides, very little need be added to the excellent and comprehensive arguments of Brentano. I should like merely to supplement them by a few remarks on the monopoly (cartel) movement which was not considered by Brentano in his works.

Sombart correctly specifies as the paramount function of the capitalistic enterprise, besides the continuous struggle for gain, its organizing ability. *To organize*, says Sombart, means to link men together towards a happy, effectual production,

¹ Cf. note 1 on p. 305.

² Second edition, so far four times reprinted unaltered.

³ SOMBART, *ut sup.*, Vol. II, p. 7, note 2. At the end: "*Dagegen jetzt wieder mit den alten, längst widerlegten Gründen L. BRENTANO, 'Die Anfänge des modernen Kapitalismus,' 1916.*"

⁴ BRENTANO, *Das Wirtschaftsleben der antiken Welt*, Jena, 1929. On pp. 13 et seq. the author reviews the conditions in Phoenicia, Babylon and Assyria; and on pp. 20 et seq. in Greece; on pp. 67 sqq., in Judea; on pp. 84 sqq., in Rome and the Eastern Empire.

means to dispose of men and objects in such a manner that the desired useful effects¹ may be unrestrictedly attained. In another place he rightly stresses the fact of *association*, the joining of a number of persons in one economic enterprise, as characteristic marks of modern capitalist structure. At the same time, however, producing no evidence, he makes a short and abrupt statement that antiquity knew slavery as the only form of economic co-operation.² In the Middle Ages one finds more forms of co-operation, none of which was capitalist.³ Capitalist companies, in particular the private trading company, did not emerge until the sixteenth century, when, according to Sombart, the earliest capitalist enterprise appeared.⁴ All

¹ SOMBART, *ut sup.*, Vol. I, pp. 320 et seq. On p. 322: "*Organisieren* heisst: viele Menschen zu einem glücklichen, erfolgreichen Schaffen zusammenzufügen; heisst Menschen und Dinge so disponieren, dass die gewünschte Nutzwirkung uneingeschränkt zutage tritt."

² SOMBART, *ut sup.*, Vol. II, p. 71: "*Gerade dieser Zusammenschluss vieler in einer Wirtschaft, die 'Assoziation,' das Gesellschaftsmässige des Wirtschaftsbetriebes, ist ja, wie oft ausgeführt worden ist, das besondere Kennzeichen des neuen europäischen Kulturkreises. Das Altertum kannte nur eine Form des gesellschaftlichen Zusammenarbeitens: die Sklavenwirtschaft.*"

³ SOMBART divides them into four groups: (1) *die Herrschaftsverbände* (the old "*Fronhofwirtschaft*," manorial system); (2) *die Handwerker-genossenschaften*; (3) *die Familiengesellschaften*; (4) *die Gelegenheitsgesellschaften* (occasional partnerships). With the Manorial Associations and Guilds, Sombart mixed the thoroughly capitalist associations of Merchants, e.g. the English *Regulated Companies*, Dutch *Directiën* of the sixteenth and seventeenth centuries (Vol. II, pp. 76 et seq.), the Italian Bankers' Companies of the fourteenth century, and the big German merchants such as Fuggers and others of the fifteen and sixteenth centuries (Vol. II, pp. 87 et seq.), whose financial power ruled all Royal Courts of Europe at that time. All this Sombart represents as *craft guilds*!

⁴ SOMBART, *ut sup.*, Vol. II, pp. 139 et seq. and 99 et seq. On p. 147 the following passage: "Wir müssen uns immer gegenwärtig halten, dass eine Offene Handelsgesellschaft jedenfalls nicht früher da sein konnte, als die kapitalistische Unternehmung, deren Entstehung wir *frühestens* in das 16. Jahrhundert glaubten verlegen zu sollen. *Ehe nicht der Begriff der Firma in dem oben angegebenen Verstande entwickelt war, ehe nicht die systematische Buchhandlung eingebürgert war, konnte es auch keine Offene Handelsgesellschaft geben.*"

earlier companies of merchants are in reality embodiments of *craft* commerce and the spirit of the old guilds.¹

The monopoly movement, which may be summed up as the continuous, unaltered pursuit of higher profits by means of a monopolization of the market, and which has since the earliest times most frequently assumed the form of agreements and company co-operation of competing merchants and producers, are the same capitalist elements which Sombart himself considers as essential. The old Indian legislation corroborates the view—as I have attempted to show—that monopolist *companies* of merchants, which were capitalist throughout, existed as early as several centuries before our era. Likewise the Roman monopolist *societies*, in existence before Christ, prove how strongly capitalist tendencies pervaded the economic life of Rome.

It was on the basis of these Roman *societies* that the later monopoly movement throughout the Middle Ages took shape. All earlier cartels of any importance, such as the salt cartel of 1301, the alum cartel of 1470, the copper cartel of 1491, and other cartels,² made use of this form. They were mostly companies which disposed of fortunes of millions of money, and which, owing to their financial power, exerted a complete economic control over Europe, and in no small degree ruled her political life also. In their pay, as we have seen, were all the Royal Courts of the time.

These facts can scarcely be denied: they are established in history beyond doubt. Sombart, therefore, himself admits, *nolens volens*, that these companies were operating with millions of money, but, he says in the same sentence, *it would be absurd to see in them modern capitalistic enterprises. To call them only*

¹ SOMBART, *ut sup.*, Vol. II, pp. 76 et seq.: "Die kaufmännischen Genossenschaften des Mittelalters waren, *wie wir wissen* (?), recht eigentlich die Träger des Handwerker-Händlerturns jener Zeit. . . . Sie waren aus so echt zünftlerischem Geiste geboren wie nur irgendeine gewerbliche Zunft. . . ."

² See Chapter IV, on p. 153, et seq., ante.

private trading companies would be misleading,¹ because they had not their own *firm* nor had they any knowledge of book-keeping by double-entry.² All these were either *associations of merchant-artisans*, which arose out of the medieval guild spirit,³ or non-capitalist *family-companies*, *fraternal* companies founded on the consciousness of family community. They were a direct continuation of the family as the oldest, most primitive form of economic life. They were formed, as a rule, after the death of the father, when the sons continued to carry on the business of the deceased as an undivided common inheritance.⁴ He carefully adds that these companies often extended over "*other relatives*" and also some "*befriended families*."⁵

¹ SOMBART, *ut sup.*, Vol. II, p. 88: "So bedeutend nun aber in zahlreichen Fällen der Umfang und die Geschäftstätigkeit dieser *Familiengesellschaften* waren: es genügt, sich die *Millionenvermögen* der Medici, der Welser, der Fuggers ins Gedächtnis zu rufen: *so verkehrt wäre es in ihnen moderne kapitalistische Unternehmungen zu erblicken. Ja, sie auch nur als 'Offene Handelsgesellschaften' zu bezeichnen, scheint mir irreführend zu sein.*"

² Cf. citation in note 1 on p. 314, post.

³ Cf. note 1 on p. 287, and note 1 on p. 309, ante.

⁴ SOMBART, *ut sup.*, Vol. II, pp. 86 sqq.: "Die Familie als Wirtschaftsform ist uralte. Man kann sie geradezu als die Urform aller wirtschaftlichen Organisation betrachten und findet ihre Spuren unschwer wieder in allen handwerksmässigen Einzel-Betrieben, die teilweise noch heute (Landwirtschaft, Hausindustrie) schlechthin auf der Familie beruhen. *Wenn wir hier aber eine Form der Gesellschaftswirtschaft als Familienwirtschaft erkennen, so denken wir an einen besonderen Zweig, den diese getrieben hat. Wir denken an jene Familienverbände, die wir im Spätmittelalter und tief in die neue Zeit hinein—namentlich in Italien und Deutschland—als Träger zum Teil bedeutender Handels-, Industrie- und Transportunternehmungen antreffen und die als Wirtschaftsformen der frühkapitalistischen Epoche von nicht zu unterschätzender Bedeutung gewesen sind.*"

"Solche *Familiengesellschaften* entstanden wohl in der Regel, *wenn die Söhne beim Tode des Vaters dessen Geschäfte in ungeteilter Erbgemeinschaft fortführten.*"

⁵ SOMBART, *ut sup.*, Vol. II, p. 87: "Sie erweiterten sich dann häufig durch Aufnahme von andern Verwandten, ja schliesslich auch von befreundeten Familien."

By putting forth arguments of this kind in support of his theory, Sombart unwittingly set it down at its true value. A very natural thing, for the sons to carry on the prosperous business of the father, and more common to-day than in former times; yet Sombart links it *directly* with the primitive, pre-historic form of family economy! Many of the largest commercial and industrial undertakings of to-day are not only carried on by the son or the relatives of the deceased father, but often add to the name of the firm "*& Son(s)*" or "*Brothers.*" According to Sombart, this is "*a direct trace of the primitive family economy*"! Such financial powers as the Fuggers, Welsers, Manlichs, Höchstetters, and others who are on a comparative level with the Rockefellers, Rothschilds, Fords, and so forth, Sombart represents as "*merchants-artisans*"! Their trading companies and cartels, controlling all the more important markets, inland and international, and linking together, besides brothers and sons, often quite complete strangers, are represented by Sombart as "*associations of kinsfolk and friends,*" as a type of family economy.¹ It was not friendship which united these people, but common financial interest, pervaded by the capitalist spirit and the endeavour to obtain best profits. Their companies were, as the records of various cartels show, not the outcome of the sentiment of friendship, but, on the contrary, were the issue of a fierce, ruthless competitive struggle, permeated rather with hate than with any warmer altruistic feelings. As we have seen, these "*unions of friends*" frequently did not come into existence until under the pressure of royal intervention.²

The non-capitalistic structure of all those companies and cartels follows, according to Sombart, also from the method of book-keeping which they had adopted. He maintains that they

¹ At the same time Sombart inconsistently stated (Vol. II, p. 87) that in the first ages of "early capitalism" some important industries and trades were undertaken by these "family" companies!

² Cf., e.g., p. 239. et seq., ante.

were of a *patriarchal* and *fraternal* structure, because they did not differentiate between the property of the enterprise and the private property of its owners. Stock was not taken every year, but only exceptionally when the undertaking changed hands, or on similar occasions.¹ Sombart considers that without regular book-keeping, and especially without a double-entry system, there cannot be a capitalist enterprise. *Accountancy* belongs with *commercial* and *organizing* activities to the essential functions of capitalist enterprise.² In this respect even the FUGGER Company was not an exception in Sombart's eyes; their business was also carried on in a *patriarchal*, in a *fraternal* manner.³

When discussing the administration and book-keeping of the Fugger house, Sombart relied on the valuable original work of Professor Strieder, *Die Inventur der Firma Fugger aus dem Jahr, 1527*.⁴ It is a great pity that he passed over in silence the important fact brought to light by Strieder, that this *patriarchal-fraternal* company of Fuggers managed 16 (sixteen!) agencies (*Faktoreien*) in almost all the important trading centres of

¹ SOMBART, ut sup., Vol. II, pp. 89 et seq.: "Der Grundsatz, der ursprünglich aller Familienwirtschaft eigen war: dass alle Einnahmen in eine Kasse fliessen, alle Ausgaben aus dieser gemeinsamen Kasse beglichen werden, beherrscht in weitem Umfange die Geschäftsführung selbst der ganz grossen Handlungshäuser noch im 15. und 16. Jahrhundert."

P. 90: "... das Pisaner *Hauptbuch* der Medici von 1424-26 erzählt uns nicht nur von Handlungsgeschäften, sondern auch von Details des Haushalts." (Cited from H. SIEVEKING, *Die Handlungsbücher der Medici*, Wien, 1905, pp. 32 et seq.)

² SOMBART, ut sup., Vol. I, pp. 322 et seq. Die Funktionen des kapitalistischen Unternehmens (1) *organisatorische*, (2) *händlerische*, (3) *rechnerisch-haushälterische*.

³ SOMBART, ut sup., Vol. II, p. 90: "Dasselbe Bild gewährt uns die Ordnung des Fuggerhauses. In der Inventur des Jahres 1527 wird zwischen Privatvermögen des oder der Fugger und dem Geschäftsvermögen kein Unterschied gemacht."

"... Demgemäss ist die Geschäftsführung (wie sie in der Buchführung ihren Ausdruck findet) *patriarchalisch*, *lax brüderhaft*."

⁴ STRIEDER, *Die Inventur der Firma Fugger aus dem Jahr 1527*, Tübingen, 1905.

Europe. As these were *separate* commercial undertakings, the famous inventory of 1527 was drawn up for each agency by the respective management.¹ The assets and liabilities of *each agency* were made out separately and the inventories and equipment also were separate for *each agency*.² The reader of Sombart's book would therefore have gained a somewhat different impression of the true character of those non-capitalist "*patriarchal unions of relatives and friends*," which managed their affairs in so domestic a manner.

It is a pity also that Sombart, when he emphasized the fact that stock-taking was irregular and unusual in the commercial enterprises of the fifteenth and sixteenth centuries, as a proof of their family character, did not mention the momentous fact that not only in the applied book-keeping of the period, but in a still higher degree in its theory, no importance was attached to annual stock-takings. Neither LUCAS PACCIOLI, the author of the first book on book-keeping by double entry, 1494,³

¹ STRIEDER, *ut sup.*, p. 4: "Ebenso lässt sich aus verschiedenen Stellen der Fuggerschen Inventur des Jahres 1527 die Vornahme einer effektiven Inventaraufnahme nachweisen. Sie wurde in den einzelnen Hauptlagern (auch Läger, Faktoreien genannt) von deren Vorständen (Faktoren) vorgenommen."

² STRIEDER, *ut sup.*, p. 8: "Die Inventur zerfällt in zwei grosse Teile, von denen der eine über die Passiva, der andere über die Aktiva Rechnung legt."

"Es folgen nacheinander die Aufstellungen der Faktorien: Hall, Schwarz, Fuggerau, Wien, Leipzig, Hochkirch, Breslau, Ofen, Neusohl, Augsburg, Nürnberg, Cöln, Antwerpen, Venedig, Rom, endlich die der spanischen Faktorei." Similarly the *assets* of the various branches, which included the inventory as a distinct item, were grouped separately ("*Inventari was an allen orten vorhanden ist in legern hauss und haussraut*," pp. 12 sqq.).

³ FRATER LUCAS de burgo sancti sepulchri, Ordinis minorum et sacre theologie humilis professor, *Summa de Arithmetica, Geometria, Proportioni et Proportionalita*, Venice, 1494. In Chapter IX of Part I there is a dissertation on book-keeping (cited by STRIEDER, *ut sup.*, p. 3). A careful English translation of this book, together with the original, is GEIJSBEEK, *Ancient Double-Entry Book-keeping* (Lucas Paccioli's Treatise, A.D. 1494, the earliest known writer on book-keeping), reproduced and translated, Denver, Colorado, 1914.

which is frequently quoted by Sombart, as one of the main factors for the existence of capitalism!¹ nor his successors during the sixteenth century, insisted on annual stock-taking; it was only in the seventeenth century that under the influence of previous practice it was accepted in theory as an important principle of commercial book-keeping.²

To learn how the Fuggers, who by the close of the fifteenth and beginning of the sixteenth centuries set the fashion to all large German firms, kept their books, it is worth while listening to what Professor Strieder says on this subject in his excellent work,³ based, like all books by this great historian, on the study of original sources. He relates that Jacob Fugger, 1495-1525, during his early stay in Italy became acquainted with the progressive Italian methods of book-keeping and of commercial practice in general. This enabled him personally to check the books and balance-sheets in his numerous branches. Thus he had always a record of the transactions of his widely ramified business. The system adopted by him equalled the most advanced Italian methods at that time.⁴ Matthäus Schwarz, later chief book-keeper of the Fuggers, for a long time studied

¹ SOMBART, *ut sup.*, Vol. II, pp. 10 sqq.: "Stellen wir die Gründe zusammen, die den Übergang zum Kapitalismus um die Wende des 15. zum 16. Jahrhundert beschleunigt oder herbeigeführt haben, so ergeben sich hauptsächlich folgende."

And as the last, ninth, cause he mentions: "*Vollendung des Systems der doppelten Buchführung (Lucas Paccioli).*"

In the first edition of his book, *Der moderne Kapitalismus*, Leipzig, 1902, Sombart ascribes the honour of having initiated the capitalistic era to another handbook, a handbook of Mathematics, written by PISANO almost three hundred years earlier. See p. 301, and note 3 on p. 301, ante.

² STRIEDER, *ut sup.*, pp. 3 et seq.

³ STRIEDER, *Jakob Fugger der Reiche*, Leipzig, 1925.

⁴ STRIEDER, *ut sup.*, p. 20: "In Italien hat sich Jakob Fugger die genaue Kenntnis der fortgeschrittensten Kaufmannspraxis und besonders des Buchführungswesens angeeignet, die es ihm später ermöglichte, die Abschlüsse und Bilanzen der Fuggerschen Filialen in häufigen Revisionsreisen selbständig zu prüfen und—was die Hauptsache war—sich jederzeit eine genaue Vorstellung von dem Stand der vielverzweigten Fuggerschen Unternehmungen zu machen. In diesem

accountancy in several Italian towns—in Milan, Genoa, and Venice. Jacob Fugger, who examined him later on this subject, was astonished at his wide knowledge of book-keeping. It appeared that it was not necessary to go to Italy as he could have learned the same with the Fuggers at Augsburg.¹ The investigations of Strieder show further that not only was the technical side of the book-keeping perfect but, what is still more important, that the Fuggers fully appreciated the value of it as a means to economic rationalization.² No doubt the accountancy of other important German companies was also highly advanced and was probably the equal of that of the Fuggers. This naturally follows as these firms were in close contact with one another.

The fact that the book-keeping adopted by them was not a double-entry system, and that it was far less developed than the book-keeping of to-day, does not weaken their strongly capitalist character. Sompart confuses the substance of capitalism, which may be summarized in the organized individual pursuit of gain, with the purely technical question of the organization of the administrative apparatus by means of which this aim is realized. It is not the external shape of the enterprise which is in question, but the purpose which it serves. If the purpose is pronouncedly capitalist, such as a systematic exercise of trade with a view to personal profit and ökonomischen Rationalismus, wie er sich in einer fortgeschrittenen Buchführung ausdrückt, hat Jakob Fugger so stark einen Wesenkern aller modernen Geschäftsgebarung gefühlt und erkannt, dass er in seinem Unternehmen schliesslich *die Buchführung auf einen derartig seltenen Höhepunkt brachte, wie er selbst in Italien kaum übertroffen wurde!*"

¹ STRIEDER, ut sup., p. 21: ". . . Er (*scil.* Matthäus Schwarz) erkannte schon jetzt (*viz.* when examined by Fugger) und noch mehr in den folgenden Monaten seiner Tätigkeit in der Augsburger Schreibstube der Fugger, dass er nicht nötig gehabt hätte, etwas in weiter Ferne zu suchen, was er in der nötigen Vollkommenheit als Lehrling Jakob Fuggers sich leicht hätte aneignen können. *Auf solcher Höhe stand die italienische Buchführungspraxis der Firma unter Jakobs Leitung.*"

² STRIEDER, ut sup., pp. 21 et seq.

a steady accumulation of gain, the enterprise that serves it is capitalist too. Form and size are immaterial. No particular condition of the one or the other could remove the capitalist stamp from an enterprise. The capitalist spirit cannot be gauged by any forms or standards. Consequently, we cannot deny the capitalist character of merchants and enterprises in the ancient states, as we have positive knowledge that they were founded on the same individual and strictly private speculation with a view to gain, fortified, moreover, by frequent monopolist agreements.

The statement of Sombart that the conception of "*firm*" was unknown to the Fugger Company and other great trading companies of that time is a complete misapprehension and inconsistent with established facts. This is a further reason why he denies them their capitalist character, the character of private trading companies, and why he describes them as primitive family companies.¹ All those who have investigated the history of the Fuggers from original sources—Ehrenberg, Jansen, Strieder, Häbler, and others²—expresses the opinion that this Company was a typical private company, trading under the style of *Fuggers*. Strieder, for instance, whom Sombart quotes in this connection, calls the Fugger Company a *private trading Company* (*offene Handelsgesellschaft*).³ That this firm did not, perhaps, have a *permanent* style resulted from the fact that *trade registers* and filing of the trade names, etc., with the registrar were not then known.

In any case their history, especially that of the Fuggers, shows that the idea of the separate nature of the company's property and of its personality—the name of the firm was only its outward and formal expression—was known to German

¹ Cf. p. 308, note 4, ante.

² The respective works of these writers have been quoted several times.

³ STRIEDER, *Studien zur Geschichte kapitalistischer Organisationsformen* . . ., ut sup. Likewise in his later work, *Jakob Fugger der Reiche*, Leipzig, 1926, pp. 86, iii, etc.

merchants as early as the end of the fifteenth century. Even one of the most notable modern forms in the evolution of this separate nature of the company's property, the German "*Tochtergesellschaft*," independent branch, was familiar to them. This form existed then in the cartel movement, and it is fully applied still to-day. A classic instance of such a "*Tochtergesellschaft*" was the trading company formed in 1495 in Hungary by the Fugger Company and the company of JOHN THURZO for a monopolistic concentration of the whole mining trade of Hungary, with special regard to the copper trade. This independent commercial enterprise, styled "*Der gemeine ungarische Handel*," possessed its own accountancy and transacted business in its own name; it had a separate legal personality, and as such it appeared during thirty years in its relation with its parents, Fuggers and Thurzo.¹ It is hardly possible to assume that the Fugger Company, which organized this Hungarian company and managed sixteen branches all over Europe, did not possess its own firm, but carried on its business in a patriarchal and domestic way, as Sombart asserts.

The above example is not the only one. The private trading company, formed in 1461 under the style "*Societas Aluminum*" by Italian banking houses for the exploitation of Papal alum in Tolfa,² closely resembled the former in structure. This also was an independent business with its own firm. A still earlier example is the cartel company in 1301, formed by two Florentine banking firms for the joint exploitation of the salines in Provence and Naples. This company, styled "*societas*

¹ STRIEDER, *ut sup.*, p. 106: "*Der gemeine ungarische Handel* verkaufte seine Bergwerksprodukte an die Fuggersche Handelsgesellschaft und ebenso an die Thurzo, die sie beide dann auf eigene Faust weiterverkauften. Umgekehrt verkauften die Fugger ihrer Tochterfirma, dem 'gemeinen ungarischen Handel,' Waren zum Weiterverkauf (Sieden und Wollstoffe, Edelsteine usw.) oder zu Geschenken für die ungarischen Herren."

Cf. also JANSEN, *Jakob Fugger der Reiche*, *ut sup.*, p. 150; STRIEDER, *Jakob Fugger der Reiche*, *ut sup.*, pp. 14 et seq.

² Cf. pp. 151 et seq., ante.

communis venditionis," was selling salt in its own name, but for the account of the parent firms.¹

In the introduction to his work Professor Sombart explained why he did not make use of the original records, stating that he would have got lost among them and that, had he done so, his book would have never been written. He kept himself therefore within the limits of the published sources of information. He admits that there are many points in the economic history of Europe, which even to-day are still obscure, which only researches in archives could clarify. But, on the other hand, he is of opinion that an investigation of those sources which are published would give one a clear general view. To present such a survey is the aim of his book, and he hopes that it will render later investigations more fruitful.² In reality, however, Professor Sombart does not care to consider sources, though published and comprehensive, which may gainsay his theories. A striking example of this improper method is the history of the Fugger Company and other big trading companies of that time in Germany.³

¹ Cf. pp. 131 et seq., ante. STRIEDER, *Studien* . . . , ut sup., pp. 150 et seq., mentioned further instances of German companies of the time of the Fuggers possessing their own firms.

² SOMBART, ut sup., Vol. I, Introduction, p. xxiv: "Mancher wird es als eine Schwäche des Buches empfinden, dass ich nur gedruckte, nicht auch handschriftliche Quellen herangezogen habe. Ihnen gebe ich zu bedenken, dass dieses Werk nicht hätte geschrieben werden können, wenn ich mich in archivalische Studien verloren hätte. Gewiss ist es richtig, dass viele Punkte der europäischen Wirtschaftsgeschichte noch heute im Dunkeln liegen, und dass nur archivalische Forschungen sie aufhellen können. Aber ein klarer Gesamtüberblick lässt sich schon heute auf Grund der gedruckten Quellen geben. Und der musste erst einmal zu geben versucht werden, gerade um die spätere Forschung um so fruchtbarer zu machen."

³ Even the manner in which Sombart quotes bibliography discloses his strange aversion to the scientific investigations which negative his theory. In his chapter on the family companies, a short list of publications is given (II, p. 87), and among others Strieder's work on those companies is cited. There is no single mention, however, either in the text or in the notes, of the fact that the latter represents

A number of original works, the outcome of studies of archives, demonstrate beyond question the capitalistic character of those companies and that their days constituted one of the most prosperous periods of the history of German industry and commerce. Strieder correctly remarked that throughout the first half and part of the second half of the sixteenth century, the merchants of Southern Germany occupied an outstanding position in the commercial, industrial, and financial world of Europe, as never before and never later.¹ The house of Fugger Strieder justly compares to the house of Rothschild, as one of the greatest families in the economic history of the world, and calls Jacob Fugger the greatest German merchant and a great international industrialist.²

How Professor Sombart's theory of the patriarchal family

a diametrically opposite view as regards the nature of those companies. The title of Strieder's book, *Studien zur Geschichte kapitalistischer Organisationsformen, Kartelle, Monopole und Aktiengesellschaften im Mittelalter und zu Beginn der Neuzeit*, which of itself would convey to the reader what Strieder thinks of those companies, has been shortened, although quoted for the first time, as follows: "*Literatur über Familiengesellschaften . . . Strieder, Organisationsformen.*" The usual practice of a short remark at least that Strieder represents a different view, as he did in the case of Brentano (cf. p. 307), might have been observed. Those who do not know Strieder's work are justified in taking it that the latter shares the views of Sombart. What is the object of such a bibliographical quotation? What purpose does it serve?"

¹ STRIEDER, *Jakob Fugger der Reiche*, ut sup., p. 1: "*In den ersten zwei Dritteln des 16. Jahrhunderts nahmen die süddeutschen Kaufleute, bald allen voran die Fugger, eine so tonangebende Stellung in der europäischen Handels-, Industrie- und Finanzwelt ein, wie niemals zuvor und niemals wieder nachher.*"

² STRIEDER, ut sup., p. 130 (Chap. X): "*Der Bankier der Kaiser und Päpste.*" "*Es gibt vielleicht kein zweites Kaufmannshaus in der Weltwirtschaftsgeschichte—das Haus der Rothschild nicht ausgenommen—, das mit der Kraft seines Geldes so nachdrücklich und so konsequent wie das Fuggersche für seine fürstlichen Geschäftsfreunde eingetreten ist.*"

Pp. 94 et seq., Chap. VIII, entitled "*Der internationale Kaufmann*"; pp. 102 et seq., Chap. IX, entitled "*Jakob Fugger als Grossindustrieller in Tirol und in Ungarn.*"

companies, based on non-capitalist primitive domestic economy, appears in the light of these facts supplied by original investigations, and whether it gives "a clear general view" and whether it can be the basis for "later fruitful investigations," the reader may judge for himself.

The removal of the beginnings of capitalism into the sixteenth century entailed further mistakes. Sombart disregards all those earlier monopolies and cartels before the sixteenth century which existed in the states of Antiquity. He disregards the Roman legislation against monopolies, in particular the constitution of Zeno, which became the starting-point for all later enactments; he disregards also the fact that the anti-cartel laws in Europe and the anti-trust laws in America descended from the common Roman source. He divides, therefore, cartels from trusts and does not see that they are only different forms of the same economic phenomenon, a primary form of which was known even in ancient times. It is no wonder, therefore, that he should contradict himself.¹

¹ SOMBART, *ut sup.*, III, pp. 527 et seq., deals with cartels in Chapter XXXII, "Elemente der Marktbildung," in a paragraph on the artificial influencing of the market (*Die künstliche Beeinflussung des Marktes*), pp. 530 et seq.; on trusts he speaks in Chapter XXXIII, "Elemente der Betriebsbildung," in paragraph on business amalgamation (*Betriebsvereinigung*). As he admits that the essential purpose of trusts is price control and monopolization of the market, which at the same time is the purpose of cartels, there is no logical reason why two forms of the same economic phenomenon should be treated in two separate chapters dealing with different subjects.

CHAPTER XI

The monopoly movement in the eighteenth and nineteenth centuries.—Conditions in England.—Free trade and monopolies.—Incessant cartel agreements in the coal-mining industry in spite of the prohibition of the new Law of 1711.—Limitation of Vend, 1787–1844.—The Statute of 1725 against monopolistic agreements in the weaving industry.—Monopolies in other branches of industry and commerce.—The monopoly movement in France.—The anti-monopoly enactments of the French Revolution.—The Code pénal of 1810.—Cartels in the coal-mining industry.—The decree of 1852 against cartels in the mining industries.—The theory of Proudhon.—Similar conditions in Belgium and other countries.—The Swedish iron cartel (Jernkontor) of 1745.—The cartel movement in Germany.—The close connection of the older monopoly movement with modern cartels and trusts.—An analogous development of events in the United States of North America

THE eighteenth and the first half of the nineteenth centuries, and also partly the second half of the latter up to the beginnings of the latest phase of the monopoly movement expressed by modern cartels and trusts, present in general an unaltered picture of the previous ages. Even events of such importance as the French Revolution, the abolition of the guild system and protective tariffs, and the introduction of the unlimited freedom of trade did not essentially influence the development of monopoly organizations.

This is particularly eloquently attested by the conditions prevailing at that time in England. Although the Crown had almost ceased granting monopoly charters since the beginning of the eighteenth century and the economic policy of the State was reconstructed in the spirit of *laissez faire* and

unrestrained individualism, watchwords generally accepted in England after the appearance of Smith's *Wealth of Nations*, monopolies remained. It proved that monopolies owed their existence not only to Royal grants and protective tariffs, but that they were much more deeply rooted.

England broke off with Mercantilism; almost all former statutes against *engrossers*, *forestallers*, and *regrators*, especially those relative to the commerce in victuals, were repealed as a superfluous and harmful interference on the part of the State with a free trade.¹ At the same time, however, it was laid down: "That nothing in this Act contained shall be construed to apply to the Offence of *knowingly* and *fraudulently* spreading or *conspiring* to spread any *false Rumour*, with *Intent to enhance or decry the Price* of any Goods or Merchandise, or to the Offence of preventing or endeavouring to prevent by Force or Threats any Goods, Wares, or Merchandise being brought to any Fair or Market, but that every such Offence may be inquired of, tried, and punished as if this Act had not been made."²

The repeal of the anti-monopoly statutes did not mean that monopolistic agreements of producers or merchants were

¹ *An Act for repealing several laws therein mentioned against badgers, engrossers, forestallers, and regrators, and for indemnifying persons against prosecutions for offences committed against the said acts* (Anno XII Georgii III, Cap. 71, 1772).

"Whereas it hath been found by experience, that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have the tendency to discourage the growth, and to enhance the price of the same; which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and in particular upon those of the cities of London and Westminster."

The Act enumerates the statutes repealed, but not all of them. Other anti-monopolistic statutes, also not all, were repealed by the *Act for abolishing the Offences of forestalling, regrating, and engrossing, and for repealing certain Statutes passed in restraint of Trade* (7° & 8° Victoriæ, Cap. XXIV, July 4, 1844).

² Section IV of the Statute 7 & 8 Victoriæ, Cap. XXIV.

legalized. In accordance with the Common Law both science and practice regarded, as before, all monopolies as illegal and punishable restraints of trade.¹ Monopolies granted by charters were dealt with in the same manner as those which came about through agreements (cartels). "*Monopoly and ingrossing*," states Hawkins, "*differ only in this, that the first is by patent from the king, the other by act of the subject between party and party*, but are both equally injurious to trade and the freedom of the subject, and therefore *are equally restrained by the common law*."² Besides, the Statute of James I of 1623 was not repealed and remained, therefore, operative in this matter.³

At the beginning of the eighteenth century the English judicature drifted away from the above principle in favour of monopolies restricted merely to certain people or localities. In the well-known case of *Mitchell v. Reynolds* (1711) the Court found: "(1) That to obtain the sole exercise of any known trade throughout England, is a complete monopoly and against the policy of the law. (2) That when restrained to particular places or persons (if lawfully and fairly obtained) the same is not a monopoly." This decision did not take into account the fact that a local monopoly does not differ in its

¹ HAWKINS, *Summary of the Crown-Law*, Savoy (London), 1728, Book I, pp. 264 et seq. (on monopolies granted by the King); pp. 269 et seq., "Of Forestalling, Ingrossing, and Regrating, and other Offences of like Nature" (Chap. LXXX). On p. 269: "*All Endeavours to inhance the Common Price of a Merchandize, and Practices which have an apparent Tendency that way . . . are highly Criminal at Common Law*."

Likewise BROWNE, *The Laws against Ingrossing, Forestalling, Regrating and Monopolizing*, London, 1767 (2nd ed.).

² HAWKINS, *A Treatise of the Pleas of the Crown* . . ., Dublin, 1788, 6th ed., Vol. I, p. 470. He cites also a number of concordant judicial decisions (pp. 478 et seq., of forestalling, ingrossing, and regrating, and other offences of the like nature). Similarly BLACKSTONE, *Commentaries on the Laws of England*, London, 1813, Vol. IV, Chap. XII, "Of Offences against Public Trade," pp. 140 et seq.

³ Cf. pp. 198 et seq., ante.

effects on consumers and local competitors from a monopoly covering the whole country, and therefore it justly met with criticism in literature.¹

A number of later decisions condemned every monopoly based on an agreement (cartel) regardless of whether or not it was a local one, stressing that "*conspiracy*" is the gist of the offence. The judgment in the case of *Rex v. Eccles*, 1783, served as model when Lord MANSFIELD said: "The illegal combination is the gist of the offence. Persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence."² This decision conformed with the ruling principle of free trade, and the later judicature followed in general the same lines.³ But could it ensure its reign in economic life?

Even Adam Smith, although he compared the fear of "engrossers and forestallers" to the fear of witches, had to make the discomfiting admission that: "People of the same trade seldom meet together, even for merriment and diversion,

¹ E.g. HIRST, *Monopolies, Trusts and Kartells*, London, 1905, p. 99: "As if a monopoly were any the less a monopoly, or any less oppressive in kind, because it is local."

² HARRISON, *ut sup.*, pp. 123 et seq. In the same spirit it was decided in other cases, particularly in the following ones: *R. v. Rowlands* (1851), 5 Cox, 404, 460; *R. v. Druitt* (1867), 10 Cox, 592, and *R. v. Bunn* (1872), 12 Cox, 316 (quoted by Harrison, *ut sup.*, pp. 127 et seq. and 148). Science and the Courts of England concurred, and still concur, in the treatment of the crime of conspiracy. HOLDSWORTH, *History of English Law*, London, 1925, Vol. VIII, p. 379: "*The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the court of Star Chamber.*" *Makarewicz*, *ut sup.*, pp. 329 and 436.

³ HOLDSWORTH, *ut sup.*, pp. 383 et seq., points out that the application of the law of conspiracy to entrepreneurs and labourers often gave rise to doubts whether this was compatible with the *laissez-faire* doctrine, which allowed the citizen to make use at discretion of his capital and work.

but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. *It is impossible indeed to prevent such meetings by any law* which either could be executed, or would be consistent with liberty and justice.”¹ History testified that in his latter statement there was more truth than in his simile of the fear of witches.

Coal producers in Newcastle-on-Tyne continued forming cartel agreements. Despite the legislative prohibitions and the unceasing attacks of public opinion, they had been monopolizing the London market almost without interruption since the end of the sixteenth century.² The new Law of 1711, annulling all such agreements and providing severe fines against offenders, proved of no avail.³ The repeated petitions in Parliament in the years 1738 and 1740 for the dissolution of the Newcastle coal monopoly attest its later existence.⁴ Moreover, when the growing output of the rival coal basin at *Sunderland* began to endanger the existence of the Newcastle cartel and a fierce competition brought down prices and made both sides suffer heavy losses auguring no victory to either of them; after protracted negotiations a new cartel was formed

¹ ADAM SMITH, *Wealth of Nations*, Vol. I, p. 130.

² *Palgrave's Dictionary*, London, 1926, Vol. III, pp. 615 et seq.

³ *An Act to dissolve the present, and prevent the future Combination of Coal-Owners, Lightermen, Masters of Ships, and others, to advance the Price of Coals, in Prejudice of the Navigation, Trade, and Manufacturers of this Kingdom, and for further Encouragement of the Coal-Trade* (Anno Regni nono Annae Reginae, A.D. 1710, Cap. XXVIII).

“ . . . all and every Contract or Contracts, Covenants or Agreements, whether the same be in Writing or not in Writing, and whether heretofore made or entered into, or hereafter to be made or entered into, by or between any Coal-Owners, Lightermen, Fitters, Masters, or Owners of Ships or Vessels, Crimps, Coal Factors, or other Person or Persons whatsoever concerned in the said Coal-Trade, for engrossing Coals, or for restraining or hindering any Person or Persons whomsoever from freely selling, buying, loading or unloading, navigating or disposing of Coals, in such Manner as they lawfully may, shall be, and are hereby declared to be illegal, null, and void, to all Intents and Purposes.”

⁴ BRAND, *History . . . of Newcastle*, London, 1789, Vol. II, p. 271.

in 1771 between the coal producers of Newcastle and Sunderland. Known later as (1787) the *Limitation of Vend*, it lasted, with a few minor interruptions, until the year 1845, and was one of the strongest cartels in the history of the older monopoly movement.¹

As the name itself indicated, this cartel did not directly regulate production, although it was a cartel of producers, but, like the great majority of older cartels, only the sale. However, by limiting the sale of coal to certain quotas adapted to the capacity of the London market, the cartel indirectly influenced also production.

According to a certain scheme each member was every year allotted his share in the conjoint quota destined for sale (the modern German "*Beteiligungsziffer*"). Larger mines and those which extracted coal of better quality had higher shares, but the price of their coal was also accordingly higher. The price, however, rose not only with quality, but, as with present cartels and trusts, also differed according to territorial zones; prices charged nearest to the source of production were the highest.

These restrictions applied only to the home market; abroad the members of the cartel had a free hand. Especially the strongest mines were taking advantage of this clause, offering coal abroad at lower prices than their competitors, below their

¹ EDINGTON, *A Treatise of the Coal Trade*, London, 1823, pp. 56 et seq. On p. 57: "Of this contention, after lasting some years, both parties became weary; they found it prudentially wise to unite in interest, to equalize the prices, to regulate the transmission from each colliery, and to feed the public at their own prices and according to their own convenience: hence their union became a direct monopoly; it was agreed that the market should be fed, and not glutted."

DUNN, *The Coal Trade of the North of England*, Newcastle, 1844, pp. 45 sqq. and 65 sqq.; *Reports of the Select Committee on the Coal Trade*, 1800, 1830, 1836, and 1871. A concise history of this cartel is given by JEANS, *Trusts, Pools and Corners*, London, 1894, pp. 50 et seq.; WILLIAMS, *Capitalist Combination in the Coal Industry*, London, 1924, pp. 28 et seq.; and LEVY, *Monopolies, Cartels and Trusts in British Industry*, London, 1927, pp. 106 et seq.

cost of production, at times even half the price charged in the London market; they were not obliged to reduce their output and easily found an outlet there. The report of the Royal Commission stated, for instance, that this cartel was sometimes selling coal in St. Petersburg 50 per cent. cheaper than in London.¹ The losses at these transactions were, of course, borne by the English consumer.² The system is still practised to-day, not only in England, but wherever cartels and trusts developed.

The Newcastle cartel could more easily carry out its monopolistic policy in London, the chief coal market, because the wholesale merchants there were also combined in a *ring* (ring formerly used to denote cartels of merchants, of non-producers).³ This cartel was already (in 1770) in existence and lasted as long as that of the producers (1845). Both cartels worked in close contact; the Secretary of the Merchants' Cartel was sending in to the inner managing committee of the Newcastle Cartel (*Committee of the Coal Trade*) reports about the conditions in the London coal market. These data and the freightage were taken into account when the prices were worked out.⁴ Owing to such a close co-operation of both cartels, the London merchants' cartel was taken for an agency of the Newcastle cartel, and has been often described in literature as "*gild-ring*."⁵

¹ *Report of 1871*, p. 12: "... the consequence of this was that frequently coal was sold to foreign markets at 40 per cent. under the prices of the London market. To such an extent was this carried that English coal was sometimes to be purchased in St. Petersburg at half the price of the same coal on the River Thames."

² WILLIAMS, *ut sup.*, p. 49: "The English consumer had to pay exorbitant prices for coal; indeed, it was from the home market that the coal owners extorted the greatest part of their gains. For it was one of the conditions of the cartel that its regulation did not extend to foreign trade."

³ This ring is one of the many evidences disproving the often repeated view that all old rings, or *rings* in general, were only *temporary speculations*, and they differ therefore in essence from cartels.

⁴ *Reports*, 1800, pp. 9 et seq.; 1836, pp. 6 and 86 et seq.

⁵ *Palgrave's Dictionary*, Vol. III, pp. 614 and 617.

This name expresses the characteristic transition of the cartel from the medieval guild form to the most up-to-date price-fixing cartel with apportioned sale. As such it is one of the most interesting monuments testifying to the close economic connection of the old guild system with the cartel organization, as two forms of *one and the same* monopoly movement.

This cartel exposes the error of current opinion which is especially widespread on the Continent of Europe (Schoenlank, Liefmann, and associates) which maintains that there is no connection between the old and modern federations of entrepreneurs regulating production and sale, that guilds were their direct opposites and the like. In this connection ROGERS appositely remarked: "The received view that 'there is no direct or indirect connection between the ancient and modern forms of trade combination' is contradicted by this 'vend,' which was once the attribute of a *gild*, then of a cross between gild and *Ring*, then of a ring; which afterwards inspired simultaneous attempts to renovate the gild and invent *Trusts*, and which now influences the policy of *Trade Unions*."¹

The cartel of Newcastle further discredits the statements of some theorists that there is no economic connection of the older cartels with the present ones, since the former were due to the absence of competition and an excess of demand over supply, whilst the latter result from unbridled competition and abundant supply. The origin of the Newcastle cartel as well as its long history disprove this assertion. To safeguard itself against overproduction and a ruinous fall in prices, the cartel had to restrict the sale of coal by its members continually. Coal was exported at a loss so as to save the mines from decay which would have followed a further reduction of output. Competition under this "voluntary" yoke was again and again rebelling. The quota system, felt as a burden,

¹ ROGERS, in *Palgrave's Dictionary*, III, p. 614, "Vend Newcastle (1602-1844)."

gave often rise to friction between the members about the proportion of their shares, and it was always with great difficulty that these were adjusted. At times they were so violent that they ended in temporary ruptures of the cartel; each time, a new and fiercer struggle broke out, followed by a sudden drop in prices. And again the competitors, heavily damaged, had to seek refuge in the hated cartel. One of these sallies lasted for almost seven years (1780-87)! It was not until a good many of these mines were no longer able to cover their own cost of production and their closing became imminent that they reverted to the cartel organization in order to escape complete ruin.¹

No wonder that this cartel, maintained for so many years with such difficulties, collapsed under the pressure of the same competition that created it. But it was by no means the result of a "conversion" of monopolistic-minded producers to the principle of unlimited free competition, the beneficial effects of which were then eagerly advertised. Quite the contrary. At the general meeting of the members of the Newcastle Vend, which took place on May 13, 1845, great efforts were made to save this cartel. But new mines were opened, and an intenser competition had so much deepened the old divergence of interests of the cartel members as to their allotments that negotiations fell through and the cartel agreement was never renewed.

A considerable fall in the coal prices resulting from the competition, which was again taken up, induced the producers

¹ *Report of 1800*, p. 5: "About the year 1786 or 1787 a particular species of compact was resorted to. The compact was a general one between all the collieries of the Wear and those of Tyne. Its avowed object was to apply a remedy to a heavy depression in the price of certain kinds of coal, and to avert the danger connected with it, of the abandonment of several collieries." DUNN, *The Coal Trade* . . ., Newcastle, 1844, p. 25: "At this period both ships and collieries were a dreadfully losing trade; the primary cause being too many mines working at one time; whilst the profits were reaped by merchants in London."

of *Durham*, who were the strongest, to draw up in the same year (1845) a project for a new cartel which would bring the mines more closely together than the previous one. Only the impossibility of adjusting too strongly opposed interests prevented the formation of the cartel.¹ Competition worsened the depression in the coal-mining industry and new attempts were made to form another cartel.² One of the coal-owners at Durham, "Mr. Joseph Pease stated in Parliament that he had given away over 10,000 tons of coal to mend the roads with, the price obtained in the London and other markets being so low that they would not pay the cost of freight. Other coal-owners bore similar testimony."³ In spite of the favourable conditions in Europe in the years 1850-72, this state of affairs continued in the English coal-mining industry almost unaltered until the beginnings of the phase of modern cartels and trusts. "Even in 1873," writes Williams, "almost forty years after the collapse of the cartel, the fighting trade of 1845 was still remembered with consternation; for a witness before the Coal Committee that year said that *the break-up of the Vend was 'an event which threatened to bring destruction upon all the trade.'*"⁴

The period of free competition in the main branch of English industry, even longer here than in Continental Europe and the United States, is, as we see, far from being the outcome of the fact that the entrepreneurs appreciated the teachings about the beneficial influence of free competition on the progress of

¹ *Report of 1873*, p. 297: "In 1845 there was a very large and a very intelligent feeling represented by some of the most extensive coal-owners in Durham to amalgamate the whole of Durham into one company."

² JEANS, *ut sup.*, pp. 52 et seq.

³ JEANS, *ut sup.*, p. 54.

⁴ WILLIAMS, *ut sup.*, p. 53. Later attempts to form a cartel are mentioned by JEANS, *ut sup.*, p. 61: "Two of the greatest conceptions of modern times in the direction of *pools or rings* were those projected in the year 1888 to *syndicate* the *coal* trade and the *flour* trade of the United Kingdom."

economic life, though so this appears to certain theorists.¹ This comparatively short period of free competition was animated by the incessant endeavour to monopolize the market, which, as we now see, eventually has been realized more thoroughly than in any other earlier time.

The 1725 Statute of King George I shows that mono-

¹ Thus, for instance, LIEFMANN, *Schutzzoll und Kartelle*, Jena, 1903, pp. 8 et seq.: "Der Hauptgrund dafür, dass das nicht der Fall war, dass in zahlreichen Industriezweigen, in denen bei uns schon lange fest geschlossene Verbände existieren—ich erinnerte an die Kohlenindustrie—dort Kartelle noch fehlen, schien mir vielmehr darin zu liegen, dass die Lehren des extremen Individualismus in England noch einen so festen Boden im Unternehmertum haben. Der Gedanke, dass die freie Konkurrenz der 'natürliche' Zustand des Wirtschaftslebens sei, und dass bei ihr der Verteil aller am besten gewahrt werde, ist dort noch ausserordentlich mächtig und verbreitet." Similarly in his earlier book on the subject, "Die Allianzen, gemeinsame monopolistische Vereinigungen der Unternehmer und Arbeiter in England," in *Conrad's Jahrbücher*, 1900, Vol. 75, pp. 433 et seq. He lately referred to it, indicating that his views are the result of personal observations in England. Ut sup., p. 8: "Vielmehr habe ich schon in meiner Arbeit über die Allianzen auf Grund der Eindrücke einer englischen Studienreise der Ansicht Ausdruck gegeben, dass der Hauptgrund für die geringe Entwicklung der monopolistischen Vereinigungen in England in den wirtschaftlichen Anschauungen der englischen Unternehmer zu suchen ist."

The utterance of such theories is evidently the consequence of an unfamiliarity with facts, and accounts for his views on the cartel and trust movement in England and America, by which, as I have shown above (see pp. 56 et seq.), he is still abiding. This is also in no small degree due to a misunderstanding of the perspicuous expositions of some leading English writers, such as MACROSTY, whom Liefmann reproaches with lack of theoretical preparation and discernment (Macrosty, *Trusts and the State*, London, 1901). LIEFMANN, ut sup., p. 61: "*Diese aus Mangel an theoretischen Untersuchungen und Abgrenzungen der verschiedenen Vereinigungsformen entstandene Konfusion zeigt sich auch in dem ersten englischen Buchs, welches die Entwicklung der monopolistischen Vereinigungen behandelt, in H. W. Macrosty's 'Trusts and the State,' London, 1901. Schon der Titel ist durchaus irreführend . . .*" etc. But the best of it is that this criticism is pronounced by Liefmann, who outstripped all by his false and inconsistent "theories" on concerns and trusts. Some of his incongruities I have pointed out on pp. 56 et seq.

polistic combinations, regulating prices of goods and labour, were a common occurrence among wool manufacturers.¹ Professor Lipson justly remarks that "the combinations formed among textile artisans in the eighteenth century were the forerunners of the great trade unions of the nineteenth century."²

And Hirst states the following: "It may be pretty safely conjectured that in nearly all the boroughs of England and Scotland during the eighteenth century consumers suffered far more from the monopoly prices imposed by butchers, bakers, brewers, etc., than did the people of New York from the Beef Trust for a few months in 1904."³

¹ *An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better Payment of their Wages* (Anno Regni XII Georgii Regis, A.D. 1725, Cap. XXXIV).

"Whereas great Numbers of Weavers, and others concerned in the Woollen Manufactures in several Towns and Parishes in this Kingdom, have lately formed themselves into unlawful *Clubs* and *Societies*, and have presumed, contrary to Law, to enter into *Combinations*, and to make *By-Laws* or *Orders*, by which they pretend to regulate the Trade, and the Prices of Goods, and to advance their Wares unreasonably, and many other Things to the like Purpose . . . and it is absolutely necessary that more effectual Provision should be made against such unlawful Combinations and for preventing such Violences and Outrages for the Future. . . .

"May it therefore please your most excellent Majesty that it may be enacted: . . . all Contracts, Covenants, or Agreements, . . . in any Parish or Place within this Kingdom, for regulating the said Trade or Mystery, or for regulating or settling the Price of Goods, or for advancing their Wages, or for lessening their usual Hours of Work, shall be, and are hereby declared to be illegal, null, and void, to all Intents and Purposes." Violators of the above provisions were punished with imprisonment up to three months.

Section VIII of the Statute of 1725, Cap. XXXIV: ". . . this Act . . . shall extend, and be construed and adjudged to extend, to Combers of Jersey and Wool, to Frame-work Knitters and Weavers, Makers of Stockings, and to all Persons whatsoever employed or concerned in any of the said Manufactures. . . ."

² LIPSON, *The History of the Woollen and Worsted Industries*, London, 1921, p. 120.

³ HIRST, *ut sup.*, p. 23.

Towards the close of the eighteenth century the monopoly movement embraced the copper-mining industry. The "Cornish Metal Company," a syndicate formed in 1785 as a reaction against unbridled competition,¹ was much spoken of.

The introduction of railways, tramways, and the growth of companies supplying towns with water and gas led, as early as the beginning of the nineteenth century, to monopolistic combinations, which despite the efforts to remove them and maintain competition still continue to this day.² The *Metro-polis Gas Act*, 1860, tacitly recognized the local monopoly of gas companies.

In France throughout the eighteenth century cartels, mostly in the form of joint stock companies, were widespread in the various branches of commerce. Buying out smaller merchants, they gained monopolistic control over the market and were able to dictate arbitrary prices.³ These cartels, according to SAVARY, were often counteracted by purchasing cartels (of consumers)

¹ *Report of the Committee on the State of Copper Mines, 1799.*

² HIRST, ut sup., pp. 24 et seq. On p. 30 we read: "In the nineteenth century the introduction of railways, tramways, and the necessity of supplying water and light to towns, led to the recognition of an important group of natural monopolies of transport and distribution. Experience has shown that under the most favourable circumstances these cannot be adequately controlled in the interests of passengers, consumers, and traders by the laws of competition."

See also Chap. III, pp. 56 et seq., "Monopolies of Transport." Professor COHN, "Ein Beitrag zur Geschichte der wirtschaftlichen Kartelle," in *Archiv für soziale Gesetzgebung u. Statistik*, Berlin, 1895, pp. 405 et seq., gives a review of the various forms of English railway combinations.

³ SAVARY, *Le parfait negociant*, Amsterdam, 1726, Vol. I, pp. 395 et seq.: "*Ces sortes des sociétés sont à proprement parler des monopoles, qui se font contre le bien public et qui renversent l'économie du commerce. J'ai vu autrefois dans des foires pareilles choses arriver; les marchands qui étoient pour vendre se tenir fermes et ne la donner de concert qu'à un même prix.*" Similarly in the later edition, Geneva, 1752, Vol. I, pp. 395 sqq. Cf. also MARTIN, *La grande industrie en France sous le règne de Louis XV*, Paris, 1900, pp. 228 et seq.; CHASTIN, *Les trusts et les syndicats de producteurs*, Paris, 1909, pp. 4 sqq. and 7.

which mutually undertook not to buy certain goods above fixed prices. This proves that cartels of merchants were keenly felt.¹

In the second half of the eighteenth century cartels of producers became, besides commercial ones, more and more frequent, as in England they resulted from an intemperate competition and were formed in particular in the *coal* industry. About the year 1760 coal producers of the *Forez* basin formed a price-fixing cartel in which sale was centralized in a kind of selling agency; a certain Baron VAUX was entrusted with the latter, and the members undertook in a special agreement to deliver to him their respective outputs. The monopoly of this cartel was strengthened by the privilege of exclusive commerce in coal within the Forez district granted by the public authority to Baron Vaux. Owing to frequent complaints against the cartel for forcing up prices, this privilege was withdrawn in 1763 and the cartel collapsed. Before long (in 1773) a similar cartel sprang up in the *Fins* basin.²

Corporations of Paris artisans in the eighteenth century did not, as Chastin points out, differ in their monopolistic policy from local *trusts*.³

Therefore, when the French Revolution came and made a new attempt to extirpate monopolies on behalf of the economic liberty of the individual, it abolished before all else guilds. The Law of March 17, 1791, guaranteed to all citizens un-

¹ Similar defensive cartels of consumers were known before. SCACCIA, *Tractatus de commerciis et cambio*, Frankfurt, 1648, p. 300; cf. pp. 206 et seq.

² MARTIN, ut sup., pp. 228 et seq.; CHASTIN, ut sup., pp. 14 et seq. (Archives Nat., F 14, 1312).

³ CHASTIN, ut sup., p. 4: "Si l'on prend pour exemple les *Corps de Métiers parisiens*, la corporation telle qu'elle s'était développée au XVIII^e siècle ne différait guère d'un *trust local*. Il s'agissait, comme aujourd'hui, de limiter le nombre des concurrents, de fixer ensuite méthodiquement les sortes et les qualités de marchandises dont la vente était autorisée, le tout sous le contrôle d'une sorte d'inquisition des *Esgards ou Maîtres jurés* qui avaient le droit, en vertu des statuts acceptés par tous les membres, de pénétrer dans les magasins et d'en examiner et inventorier les marchandises."

restricted liberty of production, work, and trade. By the Law of June 14-17, 1791, the Constituent Assembly prohibited the formation of any corporations and coalitions of people in the same profession or occupation; of entrepreneurs, artisans, or labourers.¹ The Law of July 27, 1793, declared it illegal to buy up (*accaparement*) goods and articles of everyday use as well as raw materials used for their manufacture.² This Law partly supplemented that of June 1791, for, as I indicated above, just combinations of merchants have since the remotest times made use of buying up (*engrossing, Aufkauf*) with a view to monopolizing the market. Both these laws (of June 1791 and July 1793) were unbrokenly continuing the principles laid down in the constitution of ZENO.³ Nothing more was said

¹ "Décret des 14-17 juin, 1791. Art. 1. L'anéantissement de toutes espèces de corporations de citoyens du même état et profession étant l'une des bases fondamentales de la Constitution française, il est défendu de les rétablir de fait sous quelque prétexte et sous quelque forme que ce soit

"Art. 4. Si, contre le principes de la liberté, et de la Constitution, des citoyens attachés aux mêmes professions, arts et métiers prenaient des délibérations ou faisaient entre eux des conventions tendant à refuser de concert ou à n'accorder qu'à un prix déterminé le secours de leur industrie ou de leurs travaux, les dites délibérations ou conventions sont déclarées inconstitutionnelles, attentatoires à la liberté et à la déclaration des droits de l'homme et de nul effet . . . leurs auteurs ou instigateurs seront condamnés par le tribunal de police de la commune à 500 livres d'amende chacun, et suspendus pendant un an de l'exercice de tous droits de citoyens actifs. . . ."

² "Décret des 26-28 juillet, 1793. Art. 1. L'accaparement est un crime capital. Art. 2. Sont déclarés coupables d'accaparement ceux qui dérobent à la circulation des marchandises ou denrées de première nécessité qu'ils achètent et tiennent enfermées dans un lieu quelconque, sans le mettre en vente journellement et publiquement. Art. 3. Sont également déclarés accapareurs ceux qui font périr ou laissent périr volontairement les denrées et marchandises de première nécessité. Art. 4. Les denrées et marchandises de premières nécessité sont le pain, le viande, les grains, . . . le papier . . . , le cuirs, le fer et l'acier, le cuivre, les draps, la toile et généralement toutes les étoffes, ainsi que les matières premières qui servant à leur fabrication. . . ."

³ Among the French writers, MAZEAUD, *Le régime juridique des unions d'entreprises en France*, Paris, 1926, pp. 51 et seq., noted this connection.

here, only the penalty was severer: *accaparement* was a *capital crime*. But even that was not new, because during a similar economic crisis in the Roman State towards the close of the third century, the Edict of Diocletian of the year 300 provided capital punishment against those who were buying up goods or committing similar unlawful acts.¹

What were the practical effects of this severe anti-monopoly legislation? The former combinations of producers (artisans) and merchants, as MARTIN SAINT-LÉON states, did not disappear, for the economic forces that brought about those combinations and were still operative could not be removed by a law.² Moreover, a mere fortnight after the Law of March 17, 1791, a reversion to the guild system took place and the decree of March 31, 1791, and later several others issued in the following months, restrained the liberty of exercising several occupations (of goldsmiths, jewellers, chemists, apothecaries, brokers, and the like) which an unbridled competition was threatening with ruin.³

In the year 1801 DUBOIS, the Prefect of Paris Police, organized by expressive command of Napoleon a *compulsory* corporation of bakers. On the one hand it revived a recently abolished guild, and on the other hand it was a typical coercive syndicate (*Zwangskartell*) applied nowadays on the Continent. Bakers became again a closed circle with limited membership, which gave them a monopoly in the market. Originally the membership was fixed at 641, later it was lowered to 560, because competition was still too strong and the bakers could not prosper. In return for it, those privileged bakers were obliged to observe quality and prices as set by the Prefect of Police. In the years 1801-11 a number of similar corporations of butchers, etc., were formed.⁴ This attempt to reintroduce the

¹ Cf. pp. 108 et seq., ante.

² MARTIN SAINT-LÉON, *Cartells et trusts*, Paris, 1903, p. 11.

³ LEXIS, *Gewerkvereine und Unternehmerverbände in Frankreich*, Leipzig, 1879, pp. 27 et seq.

⁴ LEXIS, ut sup., pp. 29 and 33 et seq.

guild system as a check on production proved a failure; for the technique of production was developing speedily and the number of producers-artisans was growing at a greater pace than in the past. As with the original guilds, so were these also destroyed by the same competition which created them. As soon as the sixties and seventies they fell to complete ruin.

Although the measures of June 1791 and July 1793 proved ineffective, their principles, but in a much more mitigated form, were adopted by the *Code pénal* in 1810. To conclude agreements and form unions as to the price of goods among entrepreneurs or merchants (*détenteurs*)¹ of the same branch was declared contrary to law. All methods of creating a rise or fall in the natural market prices (not merely the buying up of goods, *accaparement*) are treated jointly in article 419 of the *Code pénal* as simple transgressions (contraventions) for which imprisonment up to one year and fine are incurred. These may be aggravated by a placing under Police surveillance up to five years and a suspension of the rights of citizenship. The acts of individual persons were treated alike with the activity of combinations; however, the former became punishable only if they were deceitful or slanderous.²

¹ According to the unanimous French interpretation, under "*détenteurs*" have to be understood producers as well as merchants. Cf. BABLED, *ut sup.*, p. 131; MAZEAUD, *Le problème . . .*, p. 162.

² Art. 419 of the *Code pénal*: "Tous ceux, qui par des faits faux ou calomnieux semés à dessein dans le public, par des suroffres faites au prix que demandaient les vendeurs eux-mêmes, par réunion ou coalition entre les principaux détenteurs d'une même marchandise ou denrée tendant à ne la pas vendre ou à ne la vendre qu'à un certain prix, ou qui par des voies ou moyens frauduleux quelconques, auront opéré la hausse ou la baisse du prix des denrées ou marchandises ou des papiers et effets publics au-dessus ou au dessous des prix qu'aurait déterminés la concurrence naturelle et libre du commerce, seront punis d'un emprisonnement d'un mois au moins, d'un an au plus, et d'une amende de 500 à 10,000 francs. Les coupables pourront de plus être mis, par l'arrêt ou le jugement, sous la surveillance de la haute police pendant deux ans au moins et cinq ans au plus."

According to art. 420 of the *Code pénal* the fine is aggravated to 20,000 francs, imprisonment up to two years, and police surveillance

Article 419, slightly altered by the Law of December 3, 1926, is now in force, and as such it forms one of the proofs of the close and unbroken connection of the oldest anti-monopoly legislation crystallized in the Constitution of Zeno with the identical modern legislation.¹ It is true that in the second half of the nineteenth century and later, the binding force of article 419 was questioned, it being contended that this article was meant for other economic conditions, and as since then circumstances have entirely changed, there is now no economic justification for article 419. In particular it was argued that the Law of March 21, 1884, and its amendment of March 12, 1920, repealing article 416 of the *Code pénal* and legalizing federations of entrepreneurs (*syndicats professionnels*) rendered article 419 void. It was even said that the legislator "forgot" to alter it.² However, the contrary opinion conforming with the practice of the French Courts prevailed.³ That article 419

up to ten years, if the object of those illicit practices were corn, flour, bread, wine, or other beverages. According to art. 421 of the *Code pénal*, the Court can in all cases provided for in arts. 419 and 420 deprive the offenders of their rights of citizenship.

¹ Professor GARRAUD, in the Introduction to the book of MAZEAUD, *Les problème des unions de producteurs*, ut sup., p. ii, incorrectly calls arts. 419 and 420, *Code pénal*, a faint echo of the revolutionary laws against "accapareurs" ("... un écho bien affaibli des terribles lois révolutionnaires contre les accapareurs"). History shows that there is a direct and unbroken connection of these laws of the time of the Revolution with the prior anti-monopoly laws, as far back as the Roman days and even earlier. Garraud repeats the same in the Introduction to a later work of Mazeaud, *Les régime juridique des unions d'entreprises en France*, Paris, 1926.

² GARRAUD, *Traité théorique et pratique du droit pénal français*, Paris, 1902, Vol. VI, p. 130; BOULLAY, "Combinaison de l'art. 419 C. pén. et de la loi de 1884 sur les syndicats professionnels," in *Revue catholique des institutions de droit*, 1890, p. 93; BATBIE, "La loi sur les coalitions," in *Revue Critique de Législation et de Jurisprudence*, 1864, pp. 399 sqq.

³ BABLED, ut sup., pp. 161 et seq.; CLAUDIO-JANNET, ut sup., p. 20; MAZEAUD, *Le régime . . .*, ut sup., pp. 54 et seq. The Law Reports show that art. 419 was applied every year. In particular cf. Paris 28.II.1888, Dalloz, 1893, 2, 69; Paris, 5.VIII.1890, Dalloz, 1893,

retained uninterruptedly its binding force and was fully applicable to modern syndicats (cartels) and all industrial combinations in general, is confirmed by the amendment of December 3, 1926, which only increased the penalty and was extended to the *attempt* to commit this act, otherwise leaving everything as before. The object of these illicit industrial federations remained the same; though expressed differently. It ran: "The purpose of securing a gain which is not resultant of the natural game of supply and demand."¹ The authors of this law somehow succeeded in failing to notice that the gain obtained by means of a cartel organization could never on this account be considered as the result of "the natural game of supply and demand."

As could be foreseen, article 419 proved in practice as unsuccessful as all its anti-monopolistic predecessors from which it emanated.² Monopolistic combinations continued in the several spheres of industry and commerce.

Thus in the coal-mining industry unbridled competition and a fall in the price brought into existence many cartels in the

1, 49; Dinan, 3.II.1916, *Gazette du Palais*, 1916-1917, 651; Paris, 28.VI.1916, *Gazette des Tribunaux du Midi*, 5.VI.1921; Crim., 17.VI.1922, *Gazette du Palais*, 1922, 433. This was confirmed twice by the Minister of Justice in the French Parliament (March 17, 1890, and September 16, 1908).

¹ Art. 419, *Code pénal* (amended in its present wording): "Tous ceux: . . . 2. qui, en exerçant ou tenant d'exercer, soit individuellement soit par réunion ou coalition, une action sur le marché dans le but de se procurer un gain qui ne serait pas le résultat du jeu naturel de l'offre et de la demande, auront directement ou par personne interposée, opéré ou tenté d'opérer la hausse ou la baisse artificielle du prix des denrées ou marchandises ou des effets publics ou primes, seront punis. . . ."

² CHAUVÉAU-HÉLIE, *Théorie du code pénal*, Paris, 1887-88, 6th ed., Vol. V, p. 599; CLAUDIO-JANNET, *Des Syndicats entre industriels pour régler la production en France*, Paris, 1894, pp. 1 et seq.: "Cet enchaînement de phénomènes économiques a été reconnu depuis longtemps. Dans l'ancien régime, tandis que le droit commun s'inspirant de la loi romaine défendait tout monopole, toute coalition ayant pour objet de faire hausser les prix. . . ."

years immediately following the promulgation of the *Code pénal*. For instance, the cartel of colliery-owners in the *Rive-de-Gier* basin, formed in 1812, was an interesting specimen. To stop coal-mines which were doing badly from extending their sales by an abatement of the price which would necessarily lead to a general fall in the coal prices, injurious to the coal-mining industry, the prosperous mines combined in this cartel established a special fund out of which the losses of the weaker mines were covered. In this way it was possible to maintain a uniform price of coal at a level most profitable to the producers.¹ In the forties the cartel movement became still more intense in consequence of more ruthless and destructive competition.

The coal syndicate in the *Loire* basin became the subject of lively discussion and the object of attacks by the public, Parliament, Press, and literature. Its beginnings date from the year 1838, when the "*Société charbonnière*" was formed. It limited the output of each mine in accordance with determined quotas, set uniform prices for each of the various qualities of coal and centralized the sale in a common selling agency. In the following years this cartel included many other mines, in particular those of the *St-Étienne* basin, and in 1844 it was reorganized as "*Compagnie générale de la Loire*." Having obtained the monopoly in the French coal-mining industry it was prospering, and ensured for the centralized mines much better profits than former competition.² In 1848 a further group of mines ("*Compagnies minières de la Grand Combe*") was brought under the cartel. This, however, gave rise to such violent attacks of public opinion, accusing the cartel of *accaparement* (!), that the Government was compelled to issue, in 1852,

¹ CHASTIN, ut sup., p. 16.

² PROUDHON, *Système des contradictions économiques*, Paris, 1846, Vol. I, pp. 215 et seq.; CLÉMENT, "Nouvelles observations sur le monopole des houilles de la Loire," in *Journal des Economistes*, Paris, 1847, Vol. XVI, pp. 15 et seq.; BABLED, ut sup., p. 16; CLAUDIO-JANNET, ut sup., pp. 6 et seq.

a special decree against associations of mining undertakings in the same line, and the coal cartel was dissolved in the same year.¹ This decree, as a *lex specialis*, was operative alongside of article 419 of the *Code pénal*; similarly as in England, where the Statute of Victoria, 1711, against coal monopolies, is in force in addition to the general anti-monopoly enactments.

There is no doubt that despite the official dissolution of the coal cartel, secret agreements, if only as to prices, continued to be made between the various mines; for the economic conditions that brought about the former cartel had not changed. The existence of many cartels in several other fields of industry and commerce: in the metallurgical industry, transport trade, and insurance business, among soda manufacturers, timber merchants, etc., may be put down to the same causes. Some of these federations survived until recent times, for instance the salt cartel formed in 1864 (*Syndicat des salines de l'Est*). They all were the outcome of overproduction, keen competition for custom, and a decline in the price.² As the depression reacted on wages, workmen in several instances insisted on the formation of cartels to avoid wage-cuts. This was the case with the cartel of knitted ware manufacturers at Bar-le-duc, 1849.³ All these

¹ *Le décret du 23 octobre, 1852*: "Art. 1er. Défense est faite à tout concessionnaire de mines de quelque nature qu'elles soient, de réunir son ou ses concessions à d'autres concessions de même nature, par association ou acquisition, ou de toute autre manière, sans l'autorisation du gouvernement. Art. 2. Tous actes de réunion opérés en opposition à l'article précédent seront, en conséquence considérés comme nuls et nonavenus, et pourront donner lieu au retrait des concessions, sans préjudice des poursuites que les concessionnaires des mines réunies pourraient avoir encouru en vertu des articles 414 et 419 du Code pénal." (Cited by MAZEAUD, *Le problème des unions de producteurs*, ut sup., pp. 263 et seq.)

² BABLED, ut sup., pp. 17 et seq.; CLAUDIO-JANNET, ut sup., pp. 6 et seq.

³ CLAUDIO-JANNET, ut sup., p. 6: "En 1849 à Bar-le-duc les deux principaux fabricants de tricots avaient conclu un accord par lequel ils s'étaient engagés à maintenir invariables leurs prix de façons. Ce pacte avait été fait à la demande des ouvriers pour éviter une diminution des salaires."

cartels regulated price and marketing and frequently also directly production.

Noteworthy are the exceptionally apposite observations of PROUDHON about his contemporaneous cartel movement in France. When discussing the coal syndicate which had been so severely censured by public opinion, Proudhon, although he never favoured cartels, remarked that State interference would not prevent colliery owners from combining with intent to reduce cost of output and increase profits. They could not be forced to resume old hostilities and expose themselves to the risk of becoming bankrupt by increasing voluntarily expenses and undercutting prices. They could not be prohibited from raising prices and obtaining interest on the capital invested in the enterprise.¹

Proudhon stated, as an eye-witness, that the coal cartel in the Loire basin was by no means an isolated case, and that almost all branches of production and commerce were monopolized. They were, according to him, the outcome of the reigning system of free competition. Contrary to the anticipations of theorists, abuses of free competition for monopolistic purposes turned out to be no exceptions to the rule, but the rule itself.²

¹ PROUDHON, *Système des contradictions économiques*, Paris, 1846, Vol. I, pp. 215 et seq.: ". . . le ministre a nommé une commission chargée d'examiner le caractère et les tendances de cette effrayante société. Eh bien! je la demande, que peut ici l'intervention du pouvoir, assisté de la loi civile et de l'économie politique?"

"On crie à la coalition. Mais peut-on empêcher les propriétaires de mines de s'associer, de réduire leurs frais généraux et d'exploitation, et de tirer, par un travail mieux entendue, un parti plus avantageux de leurs mines? leur ordonnera-t-on de recommencer leurs ancienne guerre, et de se ruiner par l'augmentation des dépenses, par le gaspillage, par l'encombrement, le désordre, la baisse des prix? Tout cela est absurde.

"Les empêchera-t-on d'augmenter leurs prix de manière à retrouver l'intérêt de leurs capitaux?"

² PROUDHON, ut sup., p. 215: "En fait, l'abus a tout envahi, et l'exception est devenue la règle. . . . Or, ce fait s'est généralisé: il suffit au jurisconsulte le plus routinier de mettre la tête à sa fenêtre, pour

Capital are Proudhon's general observations on monopolies, throwing a new light on them. Until then Aristotle's conception about the *artificiality* of monopoly was generally accepted. Writers concurred in the view that monopoly was an artificial restriction imposed on free competition; this view still holds good this day. After almost 800 years, Proudhon was the first to pronounce an entirely different opinion in stating that monopoly is not an artificial check on competition but is its natural consequence, being at the same time its contradiction. Competition kills itself and leads to monopoly, which is its fatal end. This pedigree of monopoly alone is sufficient to legitimate its existence, so long as we recognize free competition, and this must be recognized, as it is an inseparable force inherent in the very nature of society.¹

According to Proudhon, monopoly as such is further excusable, because it has always, since the beginning of the world, been the strongest stimulant of progress, the expression of victorious liberty, the reward of the struggle, the glorifica-

voir qu'aujourd'hui tout absolument a été monopolisé par la concurrence, les transports (par terre, par fer et par eau), les blés et farines, les vins et eaux-de-vie, le bois, la houille, les huiles, les fers, le tissus, le sel, les produits chimiques, etc."

¹ PROUDHON, ut sup., Vol. I, pp. 185: "N'est-il pas évident, d'une évidence immédiate et intuitive, que la concurrence détruit la concurrence? Est-il dans la géométrie un théorème plus certain, plus péremptoire que celui-là?"

P. 206: "*La concurrence tue la concurrence. . .*"

Pp. 236 et seq.: "*Le monopole est l'opposé naturel de la concurrence. . .* Ainsi, le monopole est le terme fatal de la concurrence qui l'engendre par une négation incessante d'elle-même: cette génération du monopole en est déjà la justification. Car, puisque la concurrence est inhérente à la société comme le mouvement l'est aux êtres vivants, le monopole qui vient à sa suite, qui en est le but et la fin, et sans lequel la concurrence n'eût point été acceptée, le monopole est et demeurera légitime aussi longtemps que la concurrence, aussi longtemps que les procédés mécaniques et les combinaisons industrielles, aussi longtemps enfin que la division du travail et la constitution des valeurs, seront des nécessités et des lois."

tion of genius. "Monopoly is at bottom simply the autocracy of man over himself. It is the dictatorial right accorded by nature to every producer of using his faculties as he pleases, of speculating in such a speciality as he may please to choose, with all the powers of his material resources which he has created, of enjoying alone the fruits of his venture. This right is inherent in the essence of liberty and to deny it is to mutilate man in his body and soul; to hinder him in the exercise of his faculties and arrest society in its onward march. And society owes its progress to the free initiative of individuals; without monopoly society would have never come out of primeval forests, without it now the development of society would be reversed.¹

But on the other hand Proudhon is fully aware of the anti-social disastrous effects of monopoly and competition. He

¹ PROUDHON, *ut sup.*, Vol. I, pp. 238 et seq.: "... le monopole est l'expression de la liberté victorieuse, le prix de la lutte, la glorification du génie; c'est le stimulant le plus fort de tous les progrès accompli dès l'origine du monde. . . ."

"... Le monopole n'est au fond que l'autocratie de l'homme sur lui-même: c'est le droit dictatorial accordé par la nature à tout producteur d'user de ses facultés comme il lui plaît, de donner l'essor à sa pensée dans telle direction qu'il préfère, de spéculer, en telle spécialité qu'il lui plaît de choisir, de toute la puissance de ses moyens, de disposer souverainement des instruments qu'il s'est créés et des capitaux accumulés par son épargne pour telle entreprise dont il lui semble bon de courir les risques, et sous la condition expresse de jouir seul du fruit de la découverte et des bénéfices de l'aventure.

"Ce droit est tellement de l'essence de la liberté, qu'à le dénier on mutile l'homme dans son corps, dans son âme et dans l'exercice de ses facultés, et que la société, qui ne progresse que par le libre essor des individus, venant à manquer d'explorateurs, se trouve arrêtée dans sa marche."

P. 257: "Il (*scil.* monopoly) est essentiel à la société, puisque sans lui elle ne fût jamais sortie des forêts primitives, et que sans lui elle rétrograderait rapidement."

MACGREGOR, *Industrial Combination*, London, 1906, p. 116: "... defence and aggression. These are the fundamental tendencies of human nature which make for combination in politics, religion, or sociology, no less than in economics."

correctly observes that what has been called abuse of monopoly is nothing else but the result of its further development. These effects cannot be divorced from the principle, consequently they are inaccessible to the repression of the law without ruining the principle itself. Monopoly, the constitutive principle of society and the condition of wealth, is at the same time and in the same degree a principle of spoliation and pauperism. Competition is civil war, and monopoly a massacre of the prisoners.¹ This is one of those contradictions which, according to Proudhon, as a rule are a characteristic of economic laws. Hence the title of this epoch-making book, *Système des contradictions économiques*.

The above-represented expositions of Proudhon show also how strong the monopoly movement was in his days. One proof more against the view obtaining in literature which claims that in the first half of the nineteenth century, in particular in France, there were only isolated cartels and that the movement did not expand until the last decades of the nineteenth century.

Voices of later French writers testify that the monopoly movement continued also in the second half of that century without interruption, and grew in strength after the issue of the Law of March 21, 1884, legalizing professional syndicates. Under this cloak many cartels of manufacturers disguised themselves, just as formerly in the form of guilds (although this

¹ PROUDHON, ut sup., I, p. 237: "Mais le monopole, de même que la concurrence, devient anti-social et funeste . . . les soi-disant abus du monopole ne sont que les effets du développement, en sens *négatif*, du monopole légal; ils ne peuvent être séparés de leur principe, sans que ce principe soit ruiné; conséquemment, ils sont inaccessibles à la loi, et toute répression à cet égard est arbitraire et injuste. De telle sorte le monopole, principe constitutif de la société et condition de richesse, est en même temps et au même degré principe de spoliation et de paupérisme, . . . sans lui le progrès s'arrête, et avec lui le travail s'immobilise et la civilisation s'évanouit."

P. 258: "*La concurrence était la guerre civile, le monopole est le massacre des prisonniers.*"

law did not appertain to them) and towards the close of the century linked on to the latest phase of the monopoly movement, i.e. to modern cartels and trusts.¹

Conditions developed similarly in neighbouring Belgium; especially in the coal-mining and metallurgical industries, where in some syndicates of producers formed in the first half of the nineteenth century an almost uninterrupted economic connection with the present forms can be traced.² It does credit to the Belgian legislator that as early as 1866 he saw the impracticability of articles 419 and 420 of the *Code pénal*, then in force in Belgium, and abrogated them. Only the bringing about of a rise or fall in the price of foodstuffs and other goods by fraudulent means (*par des moyens frauduleux*) was declared punishable. The report of the Committee which prepared this amendment expressly stated that neither *accaparement* nor coalition aiming at higher prices through a restriction of sale is an offence.³ The practice of the Belgian Courts recognized, as early as 1877, that a cartel agreement limiting supply is binding on the *contracting parties* in so far as the cartel intends to attain thereby an equilibrium between production and consumption.⁴

Provisions like those of article 419 are to be found during the nineteenth century also in several other countries. Thus,

¹ BATBIE, *La loi sur les coalitions*, Paris, 1864, pp. 399 sqq. and 414 sqq.; CLAUDIO-JANNET, *ut sup.*, pp. 9 and 23.

² DE LEENER, *Syndicats industriels*, Bruxelles, 1904, pp. 13 sqq. and 233 sqq.

³ "La détention par un seul, c'est à dire l'*accaparement* et la *coalition* ayant pour but de limiter la vente pour obtenir un prix élevé, ne constitueraient désormais plus des délits" (cited by Claudio-Jannet, *ut sup.*, p. 22). Another important contribution to the proper interpretation of the conception of *accaparement*!

⁴ E.g. the judgment of the Tribunal in Brussels given on March 29, 1877, in the case of the syndicate of glass manufacturers, who mutually undertook to stop production until a due proportion between production and the requirements of consumption was established. The Tribunal found that this agreement was *binding on the contracting parties* (cited by Claudio-Jannet, *ut sup.*, p. 22).

for instance, the Criminal Code of 1816 of the Canton of *Ticino* punished any entrepreneurs in the same branch who formed associations and federations for the purpose of non-buying or non-selling a merchandise, or buying or selling it only at an agreed price, provided that this actually resulted in a rise or fall in the price.¹ Also the later 1874 Penal Code of this Canton dealt similarly with those who effected a rise or drop in the price by means of coalitions.²

In Austria the Penal Code of 1803 treated as grave police transgressions cases where several or all traders in a given branch of industry colluded in order to influence prices of any merchandise or service towards a rise or decline, or to bring about their scarcity.³ Along the same lines went §§ 479 and 480 of the later Austrian Criminal Code of 1852, which the later Law of 1870 on Coalitions altered so far that only understandings of industrialists, made for the purpose of effecting a rise in the price by means of intimidation or violence (*Einschüchterung oder Gewalt*), were punishable.⁴ All other agreements of this kind between entrepreneurs, though not punishable, became *ex lege* void. In Austria this law still remains in full force. These provisions against monopolies, recurring in many countries in the first half of the nineteenth century,

¹ Codice penale della Republica e Cantone del Ticino of 1816, § 205: ". . . riunioni o coalizioni fra i principali negozianti o detentori d'una stessa mercanzia o derrata tendenti a non comperarla o a non venderla, oppure a comperarla o venderla solamente ad un dato prezzo. . . ."

² Codice penale of 1874, art. 235: ". . . chi . . . mediante coalizioni produce un aumento o una diminuzione dei prezzi di merci e derrate."

³ Part II, § 227: "Die Verabredungen von mehreren oder sämtlichen Gewerbsleuten eines Gewerbes, in der Absicht, den Preis einer Ware oder einer Arbeit zum Nachtheile des Publikums zu erhöhen oder zu ihrem eigenen Vorteile herabzusetzen, oder um Mangel zu verursachen, ist als eine schwere Polizeiübertretung nach Mass der Teilnahme an derselben zu bestrafen."

According to § 228, the penalty is longer for actual organisers of these associations (up to three months) than for the other accomplices (up to one month).

⁴ Gesetz über das Koalitionsrecht of April 7, 1870.

prove that the monopoly movement at that time was universal.¹

In the eighteenth century we find a developed cartel movement in the Bohemian glass industry. An interesting cartel arose in 1715 among Bohemian glass manufacturers and merchants who exported glassware to Portugal. The reason given by the founders for its formation was severe competition between glass traders in the Portugal market which brought prices down so that no one in this branch could make better profits. They argued that if other trades and professions in all countries and towns were able to exist and prosper only owing to certain *Statutes, Regulations, and Laws*, Bohemian glass traders were also compelled to draw up suitable statutes and form between themselves and the interested glass manufacturers a confederation and community (*Conföderation und Gemeinschaft*).² This cartel comprised all the four centres of the Bohemian glass industry (Oberliebich, Bürgstein, Böhmischkannitz and Neuschloss) as well as those Bohemian merchants who exported that glass to Portugal.

According to the regulations of this cartel, every merchant-exporter had to bind himself in writing to his supplier-producer that he would strictly observe the clauses of the cartel contract. Every merchant was obliged to present this undertaking,

¹ KLEINWÄCHTER, *ut sup.*, p. 138; PICK, *ut sup.*, pp. 14 et seq.

² SCHEBEK, *Böhmens Glasindustrie und Glashandel, Quellen zu ihrer Geschichte*, Prag, 1878, pp. 356 et seq. On p. 360 we read: "Wie nun aber dieses Übel und Missbrauch zu heben, dass mehrgedachte Glashandelschaft auf eine gewisse Art und Weis, zu erhalten und im bessers Aufnehmen zu bringen, haben wir zu einer Richtschnur und Cynosur reiflich vor Augen gestellt, wienach *alle andere Professionen, Commerciën und Handelschaften in allen Ländern und Städten durch nichts anderes, als durch gewisse Statuten, Artikel und Gesetze ihren Anfang genommen, durch diese in ihrem Stand und Flore, auch in geliebter Ordnung erhalten worden.*"

This interesting paragraph giving the reason why it was necessary to form a cartel is also valuable as a first-hand document testifying to the universality of the cartel movement in Bohemia and other European countries.

attested by the producer, on importation into Portugal to the members of the cartel who supervised the observance of the agreement and to renew his assurance in their presence. The merchants also agreed to pay a fine of 100 thalers if they sold glass to such persons as would re-sell it causing harm to the cartel, viz. below cartel prices. If the merchant could not sell out all his goods and was obliged to return home, he could offer the remainder to cartel members resident in Portugal, so as to avoid selling below cartel prices. If he should not find any member ready to buy the goods, the cartel as such took them over and distributed them amongst the members.

The cartel decided to boycott outsiders rigorously, and the producers in the cartel were not allowed to sell them any glassware. On the other hand, the cartelized merchants undertook in the contract to safeguard producers against losses.

The question of setting a price on glass was prudently left out in the written contract. There is, however, no doubt that the price was uniform and its observance constituted one of the main duties of the cartel members. This clearly follows from the text of the contract. Owing to this prudent omission the cartel had secured the approval of the authority.¹

The further fortune of this cartel is unknown. At any rate it no longer existed in 1739, when a new cartel was formed in the Bohemian glass industry. This time it included only producers and was directed against all buyers, whether glass traders or not; most likely the former collaboration with merchants was not satisfactory to them. No wonder that this cartel became the target for violent attacks of the merchants. This dispute sheds a light on the true nature of the previous glass cartel of 1715, so ingeniously masked from the public authority. The merchants did not rest and complained to the public authority of the federation (*Bündniss*) of the glass-

¹ SCHEBEK, ut sup., pp. 363 et seq.

works owners being injurious to them. The denunciation, which was in writing, stated that the glass manufacturers made an agreement to observe a uniform quality, price (which was increased), and the same sizes of glassware, and in case of breach of contract to pay a penalty of 100 ducats.¹ When summoned by the authority, the producers said that they had formed the cartel to safeguard the glass industry against the many glass houses which manufactured goods of an inferior quality to sell cheaper, thus harming the whole glass trade. The increase in price was put down to the rise in the price of raw materials, especially of potash.

The Government did not consider favourably the representations of producers and in 1750 decreed the dissolution of the cartel, indicating that the proper course to be taken was to lodge with the competent authority a complaint against competitors who manufactured glass of inferior quality and sold it cheaper to the detriment of the remonstrants. The Government took the view that the formation of a convention to raise the price was contrary to the principle of free trade and injurious not only to the merchants, but even society at large.² Whether

¹ The original of this complaint is kept in the *k. k. Archiv des Minist. d. Innern* in Vienna, Bohemica IV, F. 1595-1791. A transcript is given by SCHEBEK, *ut sup.*, pp. 365 et seq. On p. 366: ". . . Die Glasshütten-Meistere haben anno 1739 in dem Stadtl Czistitz, Czaslauer Kreises eine ihnen Glashändlern nachteilige Bündnuss errichtet, vermög welcher sie einstimmig das Glas in höhern Preis zu geben und kleinere Gattung und Maass zu machen und einige Gattungen gar nicht mehr zu verfertigen unter einer Straf von 100 Kremnitzer Dukaten beschlossen und erst neulich abermalen das Glas um 30 Kr. künftig theurer zu geben errinert hätten."

² *Ibid.*: "Es streite wider die rationem commercii wann die Fabrikanten über die Erhöhung des Preises ihrer fabricatorum Partikular-Verträge errichten und dardurch nicht allein die Handelsleute, sondern auch das Publicum bedrucken, mithin ist kein Anstand, derlei conventiones nicht allein pro praeterito zu cassiren, sondern auch pro futuro zu verbieten. Sollte aber ein oder der andere Professionist schlechte Ware machen und damit zu schleudern anfangen, mithin die Ware in discredito bringen, so stehet denen Mitmeistern frei, darüber bei denen vorgesetzten Instanzen die Remedur zu suchen."

this cartel of producers, which then was in its tenth year of existence, lasted secretly any longer, despite the official dissolution, we lack information.

As regards the conditions in Italy in the eighteenth and first half of the nineteenth centuries, I did not succeed in finding in existing cartel literature instances of a developed movement such as we find in England, France, Germany, and other industrialized countries in Europe. The fact, however, that the Italian science concerned itself, especially during the eighteenth century, with monopolistic confederations, speaks at any rate for the fact that these latter were not unknown in the economic life of Italy in the period under notice. Here the expositions of SABELLUS¹ deserve mention. He comprehends the essence of monopolistic associations (price-fixing cartels and those restricting sale) like his predecessors in accordance with the conception of Aristotle. To his mind there is no economic difference between monopolies secured by entrepreneurs and merchants, especially those trading in corn and victuals, and artisans, and monopolies granted by the ruler. The latter kind is also a *crimen monopolii*, though exceptionally exempted from punishment.² As the second and last exception

¹ SABELLUS (SAVELLI), *Summa diversorum tractatum . . . , praxis criminalis*, Venetiis, 1748, Vol. III, § XXXII, "Monopolium." Likewise in his earlier work: *Pratica universale*, Firenze, 1681, pp. 252 et seq., in the chapter entitled "Monopogli."

² SABELLUS, *ut sup.*, pp. 236 et seq.: "Quod poena extraordinaria iudicis arbitrio puniantur, qui monopolium ineunt, ut charius vendatur *annona*, vel quid simile, maxime ad sustentationem vitae humanae necessarium, . . . ubi quod poena est exilii, et confiscationis bonorum."

" . . . Quod sit monopolium contra iustitiam, quando mercatores inter se conveniunt, et conspirant, ut nullus eorum vendat, nisi pretio supremo, vel medio. . . . Monopolium dicitur, ubi prohibetur negotiatio de jure permissa ad hoc, *ut unus solus illam exercent. Et solus Princeps supremus hoc potest concedere.*

" . . . Monopolium fieri dicitur per *pactum de non introducendis aliis mercibus praeter venditas.*

"Monopolium committere dicunt Artifices qui inter se conveniunt in *taxando pretio rerum.*

"Quod *Dardanaria, seu Monopolium* sit de iure prohibitum."

of impunity Sabellus mentioned, as Scaccia did before him, a monopoly formed in defence against another monopoly, i.e. associations of buyers and consumers.¹

In the *German* countries, in the period under review, we meet in the various spheres of commerce and industry with a developed cartel movement, due to an excess of supply over demand and an acute competition.

Thus, for instance, in Thuringia a price-fixing cartel was formed in the year 1735, which comprised the whole glass industry of the country to save it from the evils of over-production.² Another price cartel with centralized marketing, the organization of which was nothing short of analogous cartels of to-day, was formed in 1743 among traders in the town of Nuremberg and Weissenfels.³ Again, in 1736, seven big mirror manufacturers of Nuremberg formed a cartel which for a number of decades had a monopoly in this branch of Nuremberg's industry. In the Saxon textile industry in the second half of the eighteenth century either agreements as to prices or more centralized cartels having a common firm and selling agency were frequent, e.g. "*Haussner & Co.*," consisting of eleven important cotton merchants at Voigtland, was formed in 1780.⁴ In the steel-wire industry of *Altona* manufacturers made attempts as early as the first half of the eighteenth century, when competition was threatening them with decay, to regulate production and prices jointly. The cartel was actually formed in 1764; often renewed, it survived until the year 1810, when it was dissolved by the public authority. KNAPMANN, who discovered the cartel, justly points out that it

¹ SABELLUS, ut sup., p. 236: ". . . liceat monopolium monopolio dissolvere." In accordance with Scaccia, cf. p. 207, ante.

² STIEDA, "Altere deutsche Kartelle," in *Schmoller's Jahrb.*, Leipzig, 1913, Vol. 37, pp. 725 et seq.

³ STRIEDER, "Ein Kartell deutscher Kaufleute aus dem Jahre 1743," in *Historisches Jahrbuch*, Breslau, 1911, pp. 49 et seq.

⁴ BEIN, *Die Industrie des sächsischen Voigtlandes*, Leipzig, 1884, II, pp. 84 et seq. and 88 et seq.

strikingly resembles modern cartels in causes of origin and structure.¹

Particularly strong were monopolistic tendencies in the German mining and smelting industries throughout the eighteenth century and in the first half of the nineteenth century, and to some extent also in its second half, sometimes directly linking on to the modern phase of the cartel movement. As in England and France, so in Germany overproduction and competition were so keenly felt in the mining industries, especially in that of coal, that the Prussian Government thought it necessary to impose narrow restrictions on competition (*Direktionsprinzip*). According to the Governmental instruction of 1783, issued to mining boards, the opening of new mines was subject to a permit from the authority, the latter being issued only where the opening of a new mine became necessary. This was in order to secure to every mine a stable sale so as to avoid competition, forcing down prices to the prejudice of the industry.²

¹ KNAPMANN, *Das Eisen- und Stahldrahtgewerbe in Altona bis zur Einführung der Gewerbefreiheit*, Leipzig, 1907, pp. 94 et seq., and 103: "Der Gedanke aber an eine gemeinsame Regelung der Preise, der Produktion und des Angebots tauchte bei jeder Notlage wieder auf und fand schliesslich seine dauernde Verwirklichung in jenen Verbänden, für deren Entwicklung auch heute noch wohl ein Interesse in Anspruch genommen werden darf, bieten sie doch bis in Einzelheiten eine überraschende Parallele zu den modernen Kartellen."

"... Die ökonomischen Gründe für die Entstehung jener Verbände waren keine anderen, wie die für die heutigen Kartelle massgebenden, nämlich die masslose Konkurrenz der einzelnen Produzenten im Absatz, die den Einzelnen zu Grunde richten und die Erkenntnis, dass das Gewerbe zeitweise unter einer zu reichlichen Produktion litt. Zweck der ganzen Verbindung war durch Einschränkung der Konkurrenz und Regulierung der Produktion dem Reidemeister rentable Preise zu sichern."

² LEVY, ut sup., pp. 73 et seq. and p. 76: "The general intention of these instructions, as the wording clearly shows, is to assure a monopoly of the existing mines. 'Owing to the many seams which are being worked coal has fallen in price, and one mine takes away the market to the next, and the object is to secure that each of the mines can count on a comparatively safe market.' These regulations

There were also cases where cartels of producers made use of the *guild* organization, similarly as in England the Newcastle Limitation of Vend. Such was the cartel of smelting houses and blacksmiths in the Dukedom of *Siegen*. Deriving its validity from a Royal grant, it was formed as a guild in the second half of the eighteenth century. Except for a short break of a political nature during the French occupation in the years 1806-12, this cartel lasted till the year 1865. One can describe it as a modern compulsory syndicate; the turnout of each smeltery as well as the number of working days per year were fixed. Further, protection against overproduction was offered to the members by the prohibition of erecting new smelteries.¹ Another proof of the strict economic connection between the two forms of one movement, i.e. between cartels and guilds.

When the Mining Law of June 24, 1865, removed all restrictions from free competition in the mining industry, which the State had imposed, not quite ten years later, owing to overproduction, a new crisis set in, and with it sprang up cartels continuing uninterruptedly till this day.²

In the course of the eighteenth century monopolies based on grants of the Crown must have been frequent in many other branches of industry and commerce; this is confirmed by the election capitulations of Francis II of 1792, who solemnly promised there that he would not grant any such charters and repeal those already issued by his predecessors, as contrary to the law.³

were renewed in 1821, and continued in principle until the reform of the mining laws in 1865." STILLICH, *Steinkohlenindustrie*, Leipzig, 1906, pp. 197 et seq.

¹ Cf. pp. 291 et seq., ante.

² SARTER, "Die Syndikatsbestrebungen im niederrheinisch-westfälischen Steinkohlenbezirke," in *Conrad's Jahrb.*, Jena, 1894, pp. 1 sqq.

³ EMMINGSHAUS, *Corpus Juris Germanici*, Jena, 1844, pp. 595 et seq. Wahlkapitulation K. Franz II. v. J. 1792, Art. VII (*Von Polizeii- und Handlungssachen*), . . . § 3. "Keineswegs auch jemanden einige Privilegia auf Monopolia, es geschehe solches bei Kauf, Handel, Manufakturen, Künsten und andern in das Polizeiwesen einlaufenden

Some interesting cartels are to be found in the first half of the nineteenth century; for instance, the price-fixing cartel of seven Thuringian porcelain works of 1814¹; the syndicate of Prussian alum works of 1836, which was a most up-to-date price-fixing cartel with a central marketing scheme and which lasted without interruption until the year 1844²; the iron ore cartel at Oberlahnstein, formed in the forties, linked on to the modern phase of the cartel movement in this branch of industry³; the present price understanding of German book-sellers may be traced down to the "*Börsenverein der deutschen Buchhändler*," founded in 1825 in consequence of an acute competition which was granting rebates to customers (*Kundenrabat*) and thus cutting prices.⁴ A most classical proof of the identity of the ancient monopoly movement with the modern one and their economic connection is the salt cartel (*Neckarsalinenverein*) of 1828, which consisted of two State salt-mines on the Neckar by Wimpfen and one private mine at Ludwigshalle; it survived without break until the present day. During this long period of upwards of a hundred years this cartel altered its regulations only once, in 1869, and this owing to the abolition of the former State salt monopoly.⁵

Sachen, oder wie es sonst Namen habe möge, ertheilen, sondern da dergleichen erhalten, dieselben als den Reichssatzungen zuwider, abthun und aufheben."

Cf. also JUSTI, *Die Grundfeste zu der Macht und Glückseligkeit der Staaten; oder ausführliche Vorstellung der gesamten Polizey-Wissenschaft*, Königsberg-Leipzig, 1760, I, pp. 752 et seq.

¹ STIEDA, *Die Anfänge der Porzellanfabrikation auf dem Thüringerwalde*, Jena, 1902. On pp. 7 sqq. he gives a transcript of the cartel contract, dated June 25, 1814.

² MOLL, "Die preussische Alaunhüttenindustrie und das Alaunhüttensyndikat von 1836-1844," in *Schmoller's Jahrb.*, Leipzig, 1905, pp. 265 et seq. and 593 et seq.

³ KLOTZBACH, *Der Roheisenverband*, Düsseldorf, 1926.

⁴ POHLE, "Das deutsche Buchhändlerkartell," in *Schriften d. Ver. f. Sozialpol.*, Leipzig, 1895, pp. 461 sqq. and 480 sqq.

⁵ LIEFMANN, "Ein hunderjähriges Kartell: der Neckarsalinenverein,"

German cartels are also well known; for instance, the tinplate manufacturers' cartel of Cologne, 1862, and a number of others formed in the sixties, in a period when business conditions in Europe were on the whole favourable, and prior to the crisis of 1873.¹

Turning to Sweden we find in 1745 an exceedingly interesting cartel in the iron industry; it is all the more worthy of note as it was formed with the direct and active collaboration of the Swedish Government and Diet.² To set the iron industry, suffering from competition, on its legs and to ensure its further development, the Swedish Diet resolved in 1745 on inducing all iron producers of the country to make an agreement as to the price of iron.

Actually in the same year an understanding was reached in the Swedish iron industry; minimum prices were fixed and a special fund was established by a voluntary taxation of the cartel members (one copper thaler = about one penny, on every pound).³ With this money the cartel was buying up iron in the chief market whenever the price tended to fall below the minimum level as fixed by the cartel. Further, the iron works that, owing to trade depression, could not sell their stocks at the cartel price, placed these at the disposal of the cartel, in return for which they received loans at 4 per cent. of the value of the deposited iron calculated according to the minimum cartel price. In later years the price could be maintained only by regularly granting loans to the iron works, which otherwise would have been obliged to sell iron below

in *Vierteljahrsschrift f. Sozial- und Wirtschaftsgeschichte*, Leipzig-Stuttgart, 1929, pp. 414 et seq.; WURST, "Die Kartelle der deutschen Salinen," in *Schriften d. Ver. f. Sozialpol.*, Leipzig, 1894, pp. 139 et seq.

¹ Cf. note 2 on p. 12, ante.

² MEYER, *Beiträge zur genaueren Kenntniss des Eisenhüttenwesens in Schweden*, Berlin, 1829, pp. 21 et seq.; BECK, *Die Geschichte des Eisens*, Braunschweig, 1897, III, pp. 1103 et seq.

³ MEYER, ut sup., p. 21.

the fixed price, and this of course would bring in its train a general decline in the price of iron.

The management of the cartel and the fund rested with agents elected every year by the general meeting of cartel members, having their office at Stockholm; it was called "*Jernkontor*."

To perform its task more effectively as a regulator of iron production, the cartel availed itself of a low rated credit, which the State banks allowed it to the extent of about £45,000. Several times reorganized in later years, this cartel survived until recent times, having largely contributed to the growth of the Swedish iron industry.¹

Needless to enlarge upon the fact that the study of the history of the earlier cartel movement is of recent origin and dates only twenty years back; and that future searches in original sources will bring many new points to light, although this movement, owing to its nature, of necessity concealed its activities. But even what we know at present about monopolistic combinations in the eighteenth and nineteenth centuries upsets all theories contending that this phase marks an essential break between ancient and modern cartel forms. Neither the guild system nor its abolition, nor even the introduction of the principle of free competition could decisively affect the further development of the monopoly movement. At times, as we have seen, this movement continued in some branches of industry without any break whatever; in other fields, if an interruption came to pass at all, it was mostly of very short duration and as a rule did not exceed thirty years. In no case was it the result of a change of the existing economic order, but of a temporary boom, of more favourable conditions of marketing which rendered the cramping of trade in cartels unnecessary. When, however, the old difficulties of finding an outlet for goods came back, instantaneously the *same* old cartels return, restraining

¹ BECK, *ut sup.*, p. 1104: "Das vortreffliche Institut welches patriotischer Gemeinsinn geschaffen, hat sich bis heute erhalten."

competition and often directly production itself. Moreover, those spells of free competition cannot be considered as essential breaks in the history of the cartel movement, because they just created conditions for renewing the old restraints of competition.

The contention that modern cartels are numerous whilst those in the first half of the nineteenth century and earlier appeared only in isolated cases—which is the accepted view¹—and the discrimination between them on that account will not stand criticism. First of all, on the ground of our present knowledge of the earlier phase of the cartel movement it is absurd to speak of isolated instances of cartels then. Further, the modern cartel movement did not become a mass phenomenon immediately after the year 1873, but grew gradually in size according as the technique of production developed, as overproduction followed and the struggle for existence became more acute. Proportionally to the bulk of production in the last few decades, the earlier phase of the movement was often stronger and more of a mass movement than that of the present day; at any rate it was not weaker. Therefore, MACDONELL, in the Report of the British Committee on Trusts of 1919, reviewing the law relating to modern combinations, does not confine himself to existing conditions, but refers back to older monopoly laws (21 Jac. I, C. 3) and treats modern combinations that restrict competition as the latest phase of the *same monopoly movement* in present economic conditions.²

¹ LIEFMANN, *Kartelle, Konzerne und Trusts* (8th ed. of 1930), p. 27: "Vereinzelt hat es kartellartige Bedingungen, wie schon gesagt, auch in früheren Jahrhunderten gegeben, sowohl in Deutschland wie in anderen Ländern. . . ."

² MACDONELL, "Notes as to the Law Relating to Combinations," in *Report of Committee on Trusts*, London, 1919, pp. 31 et seq.: "Later (*scil.* during the last thirty years of the nineteenth century) the decisions of the Courts show a perception that the interests of the parties to contracts and those of the public may not always coincide, and that competition may be accompanied or followed by serious disadvantages. . . . The necessity of the existence of certain monopolies become apparent. *This may be designated the fourth period.* It is one of transition; it is the present stage."

The close connection of older monopoly combinations with present trust forms is also conspicuous in the United States of America. Contrary to the unfounded and wrong ideas of Lehnich, one does not hear of a monopoly movement in the early beginnings of the United States of America. Lehnich, namely, maintains that in young countries where industry is just beginning to develop, the excess of demand over supply calls into existence monopolistic federations of entrepreneurs, who club together so as to obtain still greater advantage over consumers.¹ In this vast and then thinly populated area there was no such competition as would end in monopolies. Still in 1800 the population of the United States amounted to a bare five millions, and so for many years they were an El Dorado for European and other emigration.

In the thirties conditions must have changed to some extent, as LIVINGSTONE's project of a Criminal Code, 1828, treated as conspiracy agreements to observe prices of labour and goods, or to raise the price of victuals.² When in 1860 the population of the United States had grown to upwards of thirty-one

¹ LEHNICH, *Kartelle und der Staat*, Berlin, 1928, pp. 129 et seq. On p. 132 we read: "Bei den Versuchen in Amerika, in denen wir Kartelle sehen und die auch ich im folgenden der Einfachheit halber mit Kartellen bezeichnen will, handelt es sich vielfach um typische Monopolvereinbarungen, wie sie in Zeiten eines dauernden 'Überwiegens der Nachfrage zu entstehen pflegen.'" When pronouncing such views resulting from ignorance of facts, Lehnich is following into the footsteps of SOMBART (*Die Ordnung des Wirtschaftslebens*, Berlin, 1925), to whom he refers several times. After Lehnich, others repeat the same, recently even ISAY, in *Kartellgesetzgebungen*, ut sup., Berlin, 1930, p. 26. This is so because what had been improvised in Continental Europe on American trusts has been taken for granted, the original searches and special works of American and English writers being given too little consideration, if any.

² WRIGHT, *The Law of Criminal Conspiracies and Agreements*, London, 1873, pp. 78 et seq.: "Livingstone's draft Penal Code (1828, 140) proposed to punish as conspiracies . . . (3) *agreements not to buy labour or goods at more, or not to sell labour or goods at less, than an agreed price, or to enhance the price of victuals. . .*" Similarly the later draft Penal Code for the State of New York (1865), § 224, 5.

millions, monopolistic agreements of producers and merchants, mostly in the form of pools, became common. Professor CURTIS compares these conditions with those which about a hundred years earlier existed in England. Curtis does not improvise (American writers do not recognize it as a scientific method, though it is popular with some European ones), but refers to the original documents of the Industrial Commission of 1901 which carried on its inquiries on the spot.¹

Says he: "In 1776 ADAM SMITH wrote, 'People of the same trade hardly meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.' Over one hundred years later, C. M. SCHWAB, the steel magnate, when asked if there had been pooling agreements in the steel industry before the trust, replied, '*Yes; in all lines of business, not only in steel, but in everything else. There were similar agreements, known as joint agreements, to maintain prices. They have existed in all lines of business as long as I can remember*' (Report of the Industrial Commission, vol. 13, p. 474, 1901). And undoubtedly as long as there have been groups of business men engaged in the same industry, among whom communication has existed, such agreements have been made. The period in which they came into special prominence as a means of federating important business organizations, however, may be said to extend from the Civil War time till 1875 or thereabouts. Then, 'big business' was only just developing in this country, and the *agreement* was naturally the first recourse under the new circumstances."²

Contemporaneous American anti-trust legislation lends colour to the fact that the economic content of the old monopoly movement is of an identical nature with the modern American trust movement. The *Sherman Act* of 1890 and the numerous American trust laws modelled after it, are, as I have shown

¹ CURTIS, *The Trusts and Economic Control*, New York, 1931, pp. 25 and 27.

² Cf. pp. 744 et seq., ante.

above, but a faithful continuation of the old English anti-monopoly laws. The practice of the American Courts confirms it, in particular the pertinent judgment of the Supreme Court of the United States given on May 15, 1911, in the celebrated case against the Standard Oil Company of New Jersey, unreservedly placed the monopoly of this large modern trust side by side with "*engrossers*," combated by the Statute of Edward VI in 1552. The Court held that the Sherman Act, like the Statute of 1552, understood monopoly as a restraint of trade.¹ The interpretation of monopoly became under the pressure of life more considerate, recognizing partial and "just" monopolies.

The view that old monopoly legislation is closely connected with modern anti-trust laws is deeply rooted in American opinion; as a typical instance may be quoted Henderson, who compares the Statute of Edward VI against "Forestallers, Regrators, and Engrossers" with the *Sherman Act* and considers the former a "more highly developed product than the Sherman Act." According to Henderson, this Statute of 1552, which as I said before continued the Roman monopoly legislation, could still to-day serve as a model for trust legislators.² Although I do not share the last opinion of Henderson, for present-day methods of monopolizing the market differ widely from those described by the Statute of Edward VI, it may be said, however, that the majority of "modern" methods

¹ *Federal Anti-Trust Decisions, Cases Decided in United States Courts*, Vol. IV, Washington, 1912, pp. 79 et seq. (The Standard Oil Company of New Jersey et Al. v. United States—Syllabus).

"... the terms '*restraint of trade*' and '*attempts to monopolize*' as used in the *Anti-Trust Act*, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the Act, and their meaning should be sought from the conceptions of both English and American law prior to the passage of the Act!

"The original doctrine that all contracts in restraint of trade were illegal was long since so modified in the interest of freedom of individuals to contract that the contract was only partial in its operation and was otherwise reasonable.

² HENDERSON, *The Federal Trade Commission*, New Haven, 1924, p. 3.

are also not new (to recall only the salt cartel of 1301, the alum cartel of 1470),¹ despite altered economic conditions, the essence of the monopoly movement remained unaltered. Both the Statute of Edward VI and the Sherman Act opposed monopoly, defending free trade. Of this state of things Henderson formed a correct view consonant with the standpoint of the Supreme Court of the United States.

¹ Cf. pp. 133 et seq. and 153 et seq., ante.

CONCLUSIONS

THIS outline of the history of the monopoly movement fully confirms what I have already indicated in the introduction: cartels and trusts of to-day are not a "modern economic phenomenon," much less a German or American "specific." They are only a phase of the same uninterrupted monopoly movement known in Phoenicia and in other markets of Antiquity and wherever free competition existed. In the course of time only the *technique* of the movement altered with the change in economic conditions. The development of means of communication, the transition from local markets to national and international ones, the application of machinery to industry and mass production made it a more powerful and general movement. But its economic content remained the same. To a considerable extent even its forms did not alter. Thus price cartels, existing before our era, are still applied to-day; quota cartels, limiting production and sale, were apart from craft guilds, which performed their part, known in their modern form in the mining industry as early as the fourteenth and fifteenth centuries. The idea of "engrossing" corn or other commodities (*accaparement*, *Aufkauf*); this primitive and ancient means of monopolizing the market was expressed, since the buying up of goods proved insufficient, in the later buying out of productive enterprises or concentration by other methods. But even this concentration of sources of production is not novel. By hiring all the olive presses in the district, Thales of Miletus monopolized the production of olive oil. Close upon 2,500 years later the same method was employed on a larger scale by KREUGER; when organizing his world monopoly, he rented and partly bought out all the match factories in Europe and America. Had these operations failed after a few months they would have been called "speculative ring," but as they held out in spite of many risky speculations

and even common frauds, they are called trust. All larger cartels and trusts to-day, as a rule, buy out competitive enterprises for the same purposes for which in former days the buying up of goods served.

History also shows that monopolies do not part with free competition. And so Professor Macrosty justly remarks that "the phrase 'free competition' has been used, but entirely free competition has never existed in any trade, except within very narrow limits."¹ Furthermore, history gives a clear explanation of the causes underlying the phenomenon: free competition is the source of monopoly. Being by two thousand years richer in experience than Antiquity, we perceive that monopolies are not, as they appeared to Aristotle, an "artificial" restriction imposed on free competition, but, as Proudhon said, its most natural and inevitable consequence. "As far as possible," says Macgregor, "it seeks to obtain a monopoly; that is the very meaning of industrial competition, the attempt to obtain a monopoly. Every firm has, indeed, some degree of monopoly. There are some clients with which it has running contracts, or on whose custom it can count. . . ."² The history of the

¹ MACROSTY, *The Trust Movement*, ut sup., p. 3.

² MACGREGOR, *The Evolution of Industry*, London, 1932, 2nd ed., p. 196. Cf. also MACROSTY, pp. 4 and 23.

Likewise SCHMOLLER, *Allgem. Volkswirtschaftslehre*, ut sup., II, p. 43: "*Das Ziel der Konkurrenz ist immer ein solches, dass nur einer oder eine bestimmte Zahl es erreicht, oft so, dass, wenn es sich um eine Mehrzahl von Siegern handelt, sie in eine Reihe geordnet werden; häufig so, dass es Sieger und Ausgeschlossene giebt, mindestens so, dass eine Hierarchie von viel und wenig Erreichenden entsteht. Die Art der Entscheidung der Kämpfe ist die allerverschiedenste: bald ist es der brutale Kampf, . . . bald sind es freie Verträge, die erstrebt, abgeschlossen oder abgelehrt, günstig oder ungünstig gestaltet werden.*"

"*. . . Seit es Konkurrenz- und Marktkämpfe giebt, haben immer die klügsten Interessanten versucht, solche Verbindungen herzustellen. Die Zünfte waren dasselbe, was heute die Fabrikantenvereine, Trusts, Ringe und Kartelle sind! . . . Die Webbs konnten nicht mit Unrecht sagen, Konkurrenz hindernde Verabredungen seien ebenso natürlich wie die Konkurrenz selbst*" (p. 50).

monopoly movement corroborates this opinion unreservedly. Hence the description of Judge Holmes that "*free competition means combination*" is no paradox.¹ Indeed, competition and monopoly form one whole, they are only two sides of one economic phenomenon; there never has been competition without monopoly or monopoly without competition. Proudhon's remark that competition kills competition must be supplemented by saying that competition kills also monopoly. Thus guilds, the most powerful cartel organization within the memory of history, came to ruin despite their long tradition and recognition by the State. It was not solely the French Revolution and factories that abolished guilds. Long before that time their existence was doomed to come to an end; the same competition that created them predetermined their fall. On the one hand intenser competition between a growing number of guild members, on the other hand the competition of a larger number of outsiders of necessity led to the destruction of guilds. The use of machinery in industry only speeded up the process. The act of the French Revolution abolishing guilds was rather a formality, and official confirmation of a foregone conclusion. As a rule, the end of all the older cartels was the same. Competition built and overthrew them, only to erect on their ruins sooner or later new monopolies. The same applies to modern cartels (trusts). Moreover, when a certain branch of industry is monopolized, competition with outsiders and rival cartels and trusts at home and abroad does not cease, and finally a struggle for shares in production and sale goes on within the cartel. And it is safe to say that as there is no competition without monopolies, so is there no monopoly without competition. Under the existing conditions this state of affairs becomes

¹ HOLMES, J., in *Vegelahn v. Gunter*, 1896: "It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that *free competition means combination*. . . ." Cited by Haslam, ut sup., p. 10.

particularly conspicuous; a typical period of "monopolistic competition."¹

Therefore, the fear of those who see in the unlimited freedom of contract the danger of its destruction are groundless.² The less convincing appears to me the view of MARX that the tendency towards concentration in capitalistic industry by its nature leads to its destruction.³ True, every capitalist kills many capitalists, but at the same time it is true that from the battle-field new capitalists arise who in turn kill the victors of yesterday. Only people pass, the system remains the same. There is no contradiction in this, on the contrary it is the most natural course of the competitive struggle for existence. That is the very meaning of our life.

This natural and close connection of competition with monopolies affords an explanation of another important fact, ascertained by history: the utter ineffectiveness of anti-monopoly laws. For thousands of years continually prosecuted with heaviest penalties, capital punishment not being excluded,

¹ Cf. ZEUTHEN, *Problems of Monopoly and Economic Warfare*, London, 1930, pp. 24 et seq. and 145: "Competition between a few enterprises such as the *monopolistic competition*, . . . is a form of transition between the two opposite types of economic organisms—Competition and Monopoly."

² GORDON, *The Problem of Trust and Monopoly Control*, London, 1928, p. 83: "It is a commonplace of political theory that an *unlimited freedom of contract may be used to its own destruction*."

STEINBACH, *Die Moral als Schranke des Rechtserwerbs und der Rechtsausübung*, Vienna, 1898, pp. 47 et seq.: ". . . dass dem Grundsatz der Vertragsfreiheit seiner Natur nach die Tendenz innewohnt, sich selbst aufzuheben, also in gewissen Sinne eine selbstmörderische Tendenz."

Cf. also *Rechtsgeschäfte der wirtschaftlichen Organisation*, Vienna, 1897, pp. 146 et seq., by the same author.

³ MARX, *Das Kapital*, Hamburg, 1872, 2nd ed., Vol. I, pp. 792 et seq.: "Die Expropriation vollzieht sich durch das Spiel der immanenten Gesetze der kapitalistischen Produktion selbst, durch die Konzentration der Kapitalien. Je ein Kapitalist schlägt viele todt."

". . . Die Negation der kapitalistischen Produktion wird durch sie selbst, mit der Nothwendigkeit eines Naturprocesses, produciert. Es ist die Negation der Negation."

they did not disappear, but considerably increased in number. And how could it be otherwise. The defence of free competition entailed the maintenance of monopolies. As long as we accept free competition, monopolistic combinations of competitors become inevitable. Therefore, it is high time that we should take note of the experience acquired during two thousand years and break off the absurd continuation of the worthless anti-monopolistic laws, such as the Sherman Act and other enactments along the same lines, and enter instead upon the road of an elastic and clear-sighted economic regulation of monopolistic organizations which often, more so to-day than in former times, are not only useful but even necessary.¹

¹ The question of the regulation of the monopoly movement will be the subject of a separate treatment on the State policy towards cartels and trusts.

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